Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

GRACEBA TOTAL COMMUNICATIONS, INC.,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR WRIT OF CERTIORARI

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May 11, 2001

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## I. QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner is denied Fifth Amendment Due Process and Equal Protection by the FCC's failure to identify a constitutional violation before imposing a remedial rule which was adopted without complying with the notice and comment requirements of the APA.

Whether Petitioner is made whole as required by the Fifth Amendment's Due Process Clause where the FCC did not allow injured auction winners to turn in their licenses for full refunds, where the FCC did not award the injured parties a discrimination bidding credit, where the FCC failed to account for the years long loss of the use of the illegally taken money, and where the FCC asserts that the "remedial bidding credit" was awarded to protect the reliance expectations of the preferred groups rather than as a constitutional remedy.

Whether Petitioner is denied Fifth Amendment Due Process and Equal Protection by the failure to follow Supreme Court precedent in denying Petitioner's request for an award of a common fund fee because of the lack of explicit third party approval and representation.

## II. LIST OF PARTIES TO THE PROCEEDING

1. Petitioner, Graceba Total Communications, Inc.,[1] is a closely held, small business, telecommunications company. There are no parent or affiliated companies.

2. Respondents, Federal Communications Commission and the United States of America.

3. Intervenors below: None.

[1] Graceba is pronounced "Gra-see'-ba."

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[1] All citations to statutes and regulations are to the current version unless noted otherwise.

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2. *Report and Order and Memorandum Opinion and Order* (*Order on Remand*), 15 FCC Rcd. 1497 (FCC 1999),[4] *recon. den., Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order* (*Reconsideration Order*), 15 FCC Rcd. 25020 (FCC 2000).[5]

## VI. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the District of Columbia Circuit filed its *Judgment* in this case on December 5, 2000.[6] On January 19, 2001, within 45 days as required by Circuit Rule 35(a), Petitioner timely filed a petition for panel rehearing which was denied by *Order* released February 12,

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[1] Reprinted Apdx. 1a.

[2] Reprinted Apdx. 214a.

[3] Reprinted Apdx. 7a.

[4] Reprinted Apdx. 14a.

[5] Reprinted Apdx. 165a.

[6] Reprinted Apdx. 1a.

2001.[7] Pursuant to Supreme Court Rules 13.1 and 13.3, the instant petition is timely filed within 90 days of the February 12, 2001 denial. The 90th calendar day after February 12, 2001 is Sunday May, 13, 2001, and, pursuant to Supreme Court Rule 30.1, the filing period is extended to the next business day, Monday, May 14, 2001. Subject matter jurisdiction arises under 47 U.S.C. § 402(j) and 28 U.S.C. § 1254(1).

## VII. CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED [8]

U.S. Const. Amend. V; 5 U.S.C. § 553(b)(3)(A), (b)(3)(B),(c) Rule making; 5 U.S.C. § 702 Right of Review; 28 U.S.C. § 1254. Courts of appeals; certiorari; 28 U.S.C. § 2343. Venue; 28 U.S.C. § 2344. Review of Orders; Time; 47 U.S.C. § 309(j)(3)(B) Design of Competitive Bidding; 47 U.S.C. § 309(j)(4)(A),(C),(D) Contents of Regulations; 47 U.S.C. § 402(a). Judicial Review of Commission's Orders; 47 C.F.R. § 1.2110 Designated Entities; 47 C.F.R. § 24.129(b) (1996) Frequencies; 47 C.F.R. § 24.309(b)(1),(b)(2) (1996) Designated entities; 47 C.F.R. § 24.321 Designated entities; 47 C.F.R. § 24.711 Frequency Block C; 47 C.F.R. § 24.720 Definitions; 47 C.F.R. § 95.816(d)(1) (1996) Competitive bidding; 47 C.F.R. § 95.816(f) (originally § 95.816(g)).

## VIII. STATEMENT OF THE CASE

### A. Case Facts

On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 ("1993 Act") amended the Communications Act of 1934 by granting the FCC authority to

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[7] Reprinted Apdx. 214a.

[8] All citations to statutes and regulations are to the current version unless noted otherwise. Texts are provided in the Appendix

employ competitive bidding procedures to choose from mutually exclusive applications in non-broadcast services.[9] The 1993 Act mandated that the FCC ensure that "businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services" by using for example "tax certificates, bidding preferences, and other procedures."[10] The FCC implemented its competitive bidding authority by adopting service-specific regulations for the auctioning of Interactive Video and Data Service (IVDS)[11] and narrowband PCS (NPCS) spectrum. The FCC established: (1) a 25% bidding credit for minority and women-owned businesses participating in the 1994 IVDS auction;[12] (2) a 25% bidding credit for minority and women-owned businesses participating in the 1994 nationwide NPCS (NNPCS) auction;[13] and (3) a 40% bidding credit for minority and women-owned businesses participating in the 1994 regional NPCS (RNPCS) auction;[14] no

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[9] 1993 Act § 6002(e), 47 U.S.C. 309(j). The Balanced Budget Act of 1997 expanded the Commission's competitive bidding authority to include certain broadcast services.

[10] 47 U.S.C. § 309(j)(3)(B), (j)(4)(D).

[11] The IVDS service is now known as the "218-219 MHz Service."

[12] *Fourth Report and Order* (*IVDS Fourth Report and Order*), 9 FCC Rcd 2330, 2337-39, ¶¶ 39-47 (1994).

[13] *Third Report and Order* (*NPCS 3rd R&O*), 9 FCC Rcd 2941, 2970 ¶ 72 (1994).

[14] No minority or women-owned business was able to take advantage of the bidding preference in order to secure an NNPCS license, which prompted the FCC to increase the size of the bidding credit used in the RNPCS auction from 25% to 40% "in order to increase the opportunities for women and minorities to participate in the provision of narrowband

other FCC auctions utilized race and gender bidding credits.

In the context of the race and gender-based IVDS bidding credits, the FCC determined that "the bidding credits in question here were expressly approved and, indeed, are required to achieve the statutory goals." *See* 47 U.S.C. §309(j)(4)(D); *IVDS Fourth Report and Order*, 9 FCC Rcd. at 2338 n. 73. In the context of the NPCS auctions the FCC determined that "Congress mandated that the FCC 'ensure' the opportunity for participation in spectrum-based services by each category of designated entity, including businesses owned by minorities and women." *NPCS 3rd R&O*, 9 FCC Rcd. at 2971 ¶ 73. The FCC found that "the best way we can accomplish these statutory mandates is to provide bidding credits exclusively to minority and female-owned businesses." *NPCS 3rd R&O*, 9 FCC Rcd. at 2972 ¶ 76.

In 1994, the FCC adopted rules governing the competitive bidding for two IVDS licenses in each Metropolitan Statistical Area (MSA).[15] The FCC gave preferential treatment to "designated entities" and provided minority- and women-owned businesses a 25% bidding credit for one license in each service area, a preference which allowed the eligible bidder to pay only 75% of its winning bid and which served as an economic advantage over other bidders. *IVDS Fourth Report and Order*, 9 FCC Rcd. at 2337-39 ¶¶ 39-47; 47 C.F.R. §95.816(d)(1) (1996).

The IVDS auction was held on July 28-29, 1994. Graceba, a small business, participated in this auction and secured licenses in two markets. *See Public Notice*, Announcing High Bidders for 594 Interactive Video and Data

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service." *See Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* (*NPCS 3rd MO&O/FNPRM*), 10 FCC Rcd. 175, 201 ¶ 58 (1994).

[15] *IVDS Fourth Report and Order*, 9 FCC Rcd. 2330 (1994).

Service (IVDS) Licenses, Mimeo 44160 (Aug. 2, 1994). In addition to winning nearly 300 of the licenses set aside for race- and gender-based bidding credits, the FCC's preferred classes won, without the use of bidding credits, 103 IVDS auctions which equals 34.6% of the 297 non-set-aside licenses.

On July 29, 1994, the FCC completed the auction of ten NNPCS licenses; an eleventh license was awarded through the FCC's pioneer preference program. *See Public Notice*, Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Mimeo 44177, released August 2, 1994. As part of the competitive bidding procedures for that auction, the FCC made available a 25% bidding credit for minority- and women-owned businesses for three of the ten NNPCS licenses auctioned. *NPCS 3rd R&O*, 9 FCC Rcd. at 2970 ¶ 72. None of the NNPCS auction winners were eligible to receive the race and gender-based preferences.[16] The NNPCS auction winners were Paging Network of Virginia, KDM Messaging Company, Nationwide Wireless Network Corp.,[17]

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[16] Because "the 'injury in fact' is the denial of equal treatment from the imposition of the barrier, not the ultimate inability to obtain the benefit," *DirectTV v. FCC*, 110 F.3d 816, 830 (D.C. Cir. 1997), it is irrelevant whether there are any demonstrated cases of preferred class members obtaining licenses, even if the FCC could demonstrate that none participated in the auction. *See also Texas, et al. v. Lesage*, 528 U.S. 18, 21 (1999) ("a plaintiff who challenges an ongoing race-conscious program and seeks forward looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is 'the inability to compete on an equal footing.' *Northeastern Fla. Chapter, Associated General Contractors of America v. Jacksonville*, 508 U.S. 656, 666 . . . (1993)."

[17] Nationwide Wireless Network Corp. also paid for and received a NNPCS license under the FCC's subsequently discontinued pioneer's preference program. Although that license was not acquired at auction, remedial action is required because the amount paid for the license "was calculated based on a discount of the lowest amount paid at auction for a

AirTouch Paging, BellSouth Wireless, and PageMart II, Inc.

On November 8, 1994, the FCC completed the auction of thirty RNPCS licenses. In this auction the FCC made available a 40% bidding credit for minority- and women-owned businesses for ten of the thirty licenses auctioned.[18] Of the nine RNPCS auction winners, three were minority or women-owned businesses who were able to take advantage of the 40% bidding credit to secure ten out of the thirty licenses.[19] The six auction winners of the twenty remaining RNPCS licenses who did not receive a 40% discount on their winning bid amounts were Advanced Wireless Messaging, Inc., AirTouch Paging, Ameritech Mobile Services, Inc., MobileMedia PCS, Inc., PageMart II, Inc., and Insta-Check Systems, Inc. The members of the non-preferred class have since paid for their licenses in full with the exception of Insta-Check Systems, Inc., who is making installment payments for its license.[20]

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nationwide narrowband PCS license." *Memorandum Opinion and Order*, 13 FCC Rcd. 12914 ¶ 1 (FCC 1998). Thus, the price paid for this license was affected by the FCC's reliance upon tainted auction prices.

[18] *NPCS 3rd MO&O/FNPRM*, 10 FCC Rcd. at 201 ¶ 58.

[19] *Public Notice*, Announcing the High Bidders in the Auction of 30 Regional Narrowband (PCS) Licenses, released November 9, 1994. One minority-owned business, Insta-Check Systems, Inc., was the high bidder for Region 2, block 5 -- Channel 16, but was unable to take advantage of the bidding credit since the bidding credit was not available for Channel 16 licenses (the bidding credit was only available in blocks 2 and 6 -- Channels 13 and 17). *NPCS 3rd MO&O/FNPRM*, 10 FCC Rcd. 175, Appendix of Rules at 2; 47 C.F.R. §§ 24.129(b), 24.309(b)(2) (1996).

[20] Insta-Check Systems, Inc. qualified as a small business designated entity and opted to pay its bid amount in installment payments. The installment payments option turned on whether the applicant was a small business and not on the race or gender of the applicant and no constitutional issue arises on that score. 47 C.F.R. §24.309(b)(1) (1996).

Within one year after the IVDS, NNPCS and RNPCS auctions were held, the Supreme Court decided *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), which held unconstitutional the federal government's preference for minority-owned businesses absent a showing of discrimination. In July 1995, within 30 days after *Adarand* was decided, Graceba filed an *Emergency Petition for Relief and Request for Expedited Consideration*, in conjunction with Graceba's pending August 1994 *Petition for Reconsideration*, which sought relief from the FCC's use of race- and gender-based bidding preferences in the 1994 IVDS auction.

On December 6, 1995, the FCC released an *Order* (*Graceba Denial Order*), 11 FCC Rcd. 1282 (FCC 1995) which, among other things, denied Graceba's request for relief on the grounds that Graceba's constitutional claim was untimely, *Graceba Total Communications v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997) (*Graceba Remand Order*); Apdx. 10a-11a, and because Graceba had failed "to make an individualized showing[] of financial need or discrimination." *Graceba Remand Order*, 115 F.3d at 1041. Apdx. 11a-12a. Graceba sought review of the FCC's 1995 *Graceba Denial Order* in the D.C. Circuit and on June 20, 1997, after hearing oral argument, the court remanded the case to the FCC for further consideration of, *inter alia*, Graceba's constitutional claim and consideration of the rights of other parties affected by the FCC's use of race and gender-based bidding preferences. *Graceba Remand Order*, 115 F.3d at 1040, 1042. Apdx. 12a-13a. The Court noted that there were several areas to be explored regarding the constitutional issue including "questions about finality of FCC licenses, fairness to auction participants not represented here, and other fact-specific, policy-laden concerns, [that] would benefit from the agency's expertise." 115 F.3d at 1042.

On April 30, 1998, nearly a year after the *Graceba Remand Order*, Graceba filed with the FCC a *Petition for*

*Action on Remand and Supplement to Emergency Petition for Relief and Request for Expedited Consideration*. At that time the FCC had not taken any action in response to the *Graceba Remand Order* nor had the FCC requested comment from the public concerning the remanded issues. On January 4, 1999 Graceba filed with the court of appeals a *Petition to Reassert Jurisdiction, or, Alternatively, Petition for Writ of Mandamus to the Federal Communications Commission Directing Action on Remand in Case No. 95-1599* (No. 99-1003). In September 1999 the FCC issued a *Report and Order and Memorandum Opinion and Order* (*Order on Remand*), 15 FCC Rcd. 1497 (FCC 1999),[21] *recon. den.*, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order* (*Reconsideration Order*), 15 FCC Rcd. 25020 (FCC 2000); Apdx. 165a, and the court of appeals canceled the scheduled mandamus hearing and dismissed the mandamus petition on the grounds that Graceba now had an FCC order to appeal.

The *Order on Remand* adopted 47 C.F.R. § 95.816(f) to provide a "Remedial Bidding Credit"[22] and the FCC stated that

> [W]e will provide a remedy responsive to commenters and the issues raised in the Graceba Emergency Petition and the Remand Petition, as well as the Community Application for Review. We will eliminate from our rules the minority- and women-owned business bidding credits and will simultaneously grant credits of commensurate size to all winning small business bidders in the first IVDS auction. . . . [T]he conversion of race- and gender-based bidding credits to small business bidding credits resolves the issues presented by Graceba. Regardless of race or gender, all small

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[21] 64 Fed. Reg. 59656 (November 3, 1999). Apdx. 14a.

[22] The Remedial Bidding Credit Rule was initially placed at 47 C.F.R. § 95.816(g). *Order on Remand*, at Appendix B-Final Rules, Apdx. 145a.

> business winning bidders were eligible to pay for their licenses in installment payments in what is now the 218-219 MHz Service, so there is no need to invoke the strict scrutiny standard of *Adarand*. Thus, we believe it is appropriate to extend the further benefit of a bidding credit based solely on size.

*Order on Remand*, 15 FCC Rcd. at 1532-34 ¶¶ 60, 62; Apdx. 77a, 78a. The FCC stated that it selected this remedy because "there is no known negative impact on minority and women-owned bidders because all such bidders also met the small business qualifications and are therefore no disadvantaged by our action." *Order on Remand*, 15 FCC Rcd. at 1534 ¶ 61; Apdx. 78a. The FCC determined that the Remedial Bidding Credit would not cause the preferred groups to suffer increased financial liabilities. *Order on Remand*, 15 FCC Rcd. at 1534 fn. 205; Apdx. 78a. At oral argument the FCC advised the court of appeals that the FCC "chose the 25 percent discount [as] the remedy that it was going to give to equalize the parties which is, of course, exactly the remedy that they requested all along." Trans. at 33 ln. 4-7; Apdx. 215a.

**B. The Court of Appeals' Decisions and Jurisdiction**

Review of the FCC's order in the court of appeals below was authorized by Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), 28 U.S.C. §§2341 *et seq.*, and 5 U.S.C. § 702. Public notice of the *Order on Remand* was published in the Federal Register on November 3, 1999 at 64 Fed. Reg. 59656.[23] Thereafter, Case No. 99-1437 was timely filed in the United States Court of Appeals for the District of Columbia Circuit on November 5, 1999, within the 60 day period established by 28 U.S.C. § 2344. Venue in the court of appeals was appropriate pursuant to 28 U.S.C. § 2343.

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[23] 15 FCC Rcd. 1497 (FCC 1999).

On December 5, 2000, after hearing oral argument, the United States Court of Appeals for the District of Columbia Circuit, issued its *Judgment* denying Graceba's petition for review. On December 13, 2000, the FCC released its *Reconsideration Order*, 15 FCC Rcd. 25020 (FCC 2000); Apdx.165a, which states that the Remedial Bidding Credit was adopted, not "as a remedy for race and gender discrimination," but because "it would be disruptive and unfair not to provide some form of bidding credit in this service, as licensees had crafted business plans in reliance upon the credit. *Reconsideration Order*, 15 FCC Rcd. at 25041 ¶ 44; Apdx. 202a-203a. On February 12, 2001 the court denied Graceba's request for rehearing which was predicated, *inter alia*, upon the FCC's assertion in the *Reconsideration Order* that the Remedial Bidding Credit was not a constitutional remedy, but served only to protect the reliance expectations of the preferred groups.

## IX. ARGUMENT

### A. The FCC's APA Violation

While the court of appeals faults Graceba for failing to raise various requests for relief before the FCC, *Memorandum*; at 1-2; Apdx. 3a-4a, the court of appeals completely failed to address Petitioner's lead argument that the FCC violated the APA's notice and comment requirements when it adopted the Remedial Bidding Credit rule. *Brief*, No. 99-1437, at 11, 22; *Reply*, 99-1437, at 3, 11-16; *Petition for Rehearing*, No. 99-1437, at 2-7. The court of appeals effective-ly holds that Graceba is not entitled to the protections afforded by the APA's notice and comment procedures despite the FCC's adoption of a substantive rule which "converted" the impermissible race- and gender-based credits to small business credits to resolve the issues presented by Graceba for the express purpose of protecting the reliance interests of the preferred groups. *Order on Remand*, 15 FCC Rcd. at 1532-34 ¶¶ 60-2; Apdx. 76a-79a. The court of appeals does not provide any legal citation supporting the proposition that a party raising race and gender

discrimination claims is not entitled to notice and comment procedures and Petitioner is not aware of any.

Graceba was entitled to a properly noticed proceeding to review the FCC's proposed remedial plan. 5 U.S.C. § 553(b) provides that the required notice, whether personally served upon named individuals or published generally, "shall include . . . (1) a statement of the time, place, and nature of public rule making proceedings . . . [and] (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[24] The challenged order itself confesses that the FCC failed to issue notice of the proposed remedy, *Order on Remand*, 15 FCC Rcd. at 1532 ¶ 59; Apdx. 74a, and Graceba was not otherwise provided with information concerning the "terms or substance of the proposed rule" nor was Petitioner provided with a statement from the FCC describing "the subjects and issues involved," such as the FCC's desire to protect the reliance interests of the preferred groups.

The application of the notice and comment requirements of 5 U.S.C. § 553(b),(c) are not dependant upon whether the agency purports to grant relief discussed in unsolicited comments. While there are exceptions to the notice and comments procedures, such as for interpretative and procedural rule adoption, or where good cause exists and such reasoning is explained in the order, *see* 5 U.S.C. 553(b)(3)(A), (B), the challenged *Order on Remand* does not maintain that the remedial program is exempt from the notice and comment requirements. "It is well established that the exemption under section 553(b)(3)(A), for "rules of agency organization, proce-

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[24] *See e.g. Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies*, 13 FCC Rcd. 23004 (1999), No. 00-1094 vacated January 16, 2001 (D.C. Cir.) (FCC issued NPRM concerning remanded EEO issue); *see also National Association of Broadcasters v. FCC*, 554 F.2d 1118, 1125 n. 19 (D.C. Cir. 1976) (FCC issued FNPRM in response to Supreme Court remand on filing fee issue).

dure, or practice," does not apply to agency action that "substantially alter[s] the rights or interests of regulated" parties." *Air Transportation Association of America v. DOT*, 900 F.2d 369, 372 (D.C. Cir. 1990). The FCC's remedial action clearly implicates Petitioners' monetary interests, thus there is no 553(b)(3)(A) exemption. Moreover, the rule is not saved by the "good cause" exception under 553(b)(3)(B) because there were no time constraints which posed an "insurmountable obstacle to complying with the applicable notice and comment requirements of the APA." *Air Transportation Association of America v. DOT*, 900 F.2d at 372. Quite the contrary, the FCC delayed so long a mandamus hearing was ordered in No. 99-1003.

The court of appeals has "'held unequivocally that when a party complains of an agency's failure to provide notice and comment prior to acting, it is that failure which causes 'injury'; and interested parties are 'aggrieved' by the order promulgating the rules.' *JEM Broadcasting Company, Inc. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994)." *Reply*, No. 99-1437, at 3; *Petition for Rehearing*, No. 99-1437, at 4-5. However, the court of appeals determined, without discussion, that Graceba was not entitled to the APA's notice and comment protections in a civil rights case.[25] Compliance with APA requirements is not dependant upon whether the FCC grants some relief to an informal commenter and there is no support for the proposition that a plaintiff in a civil rights case lacks statutory protections afforded to other plaintiffs. The failure to accord APA protections violated Graceba's Fifth Amendment due process and equal protection rights. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (the Fifth Amendment's Due Process Clause has an equal

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[25] Notice and comment procedures were followed in *Omnipoint Communications, Inc. v. FCC*, 78 F.3d 620, 629 (D.C. Cir. 1996) when the FCC eliminated race and gender preferences prior to the conduct of an auction. *Reply*, No. 99-1437, at 11-12.

protection component).

While the court of appeals' *Memorandum* finds that Petitioner should have raised the request for an "additional" 25% credit before the FCC; Apdx. 3a, it fails to explain when the issue should have been raised and the implied determination that Petitioner was obligated to file comments in a non-existent rulemaking proceeding is not well considered. The court of appeals' reliance upon *Bartholdi Cable Co., Inc. v. Federal Communications Commission*, 114 F.3d 274 (D.C. Cir. 1997), *Memorandum*, at 1, is misplaced because *Bartholdi* concerns an enforcement proceeding initiated by the FCC in which the target responded to official inquiries posed by the FCC's enforcement bureau, that is, the target received notice of the issues. The target failed to raise attorney/client/work product arguments in response to the FCC's inquiries but raised them for the first time before the Court.

Unlike the target in *Bartholdi*, here the FCC did not establish any proceeding to file comments and the FCC provided no notice regarding the FCC's remedial program. Graceba timely filed its case with the court of appeals within 60 days after publication of the *Order on Remand* in the Federal Register and Petitioner's argument that the FCC failed to comply with APA requirements was properly raised. *See JEM Broadcasting Company, Inc. v. FCC*, 22 F.3d at 325 ("challenges to the procedural lineage of agency regulations, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the 60-day period provided by statute."); *see also NLRB Union v. FLRA*, 834 F.2d 191, 195-97 (D.C. Cir. 1987) (summarizing circuit law with respect to various types of challenges against rule adoption).

The court of appeals incorrectly concluded that "Graceba cannot demand a judicial remedy where the Commission honored precisely the remedial preference that

Graceba advanced." *Memorandum*, at 2; Apdx. 4a. Immediately after the court of appeals issued its *Memorandum*, the FCC issued its *Reconsideration Order* where the FCC very pointedly flip-flopped on whether the Remedial Bidding Credit was provided as a remedy for Graceba and the FCC stated that the Remedial Bidding Credit was adopted not "as a remedy for race and gender discrimination," but because "it would be disruptive and unfair not to provide some form of bidding credit in this service, as licensees had crafted business plans in reliance upon the credit." *Reconsideration Order*, 15 FCC Rcd. at 2504 ¶ 44; Apdx. 202a-203a. *Petition for Rehearing*, No. 99-1437, at 1-2, advised the court of appeals that the FCC had explicitly ordered that the Remedial Bidding Credit was not intended to remedy the constitutional violation. Absent notice from the FCC concerning the remedy it was planning to implement, Graceba's comments regarding the remanded issues and remedies submitted in its April 1998 *Petition for Action on Remand* amounted to nothing more than a necessarily unfocused scatter shot in an effort to prod the FCC to action where it was clearly dragging its feet; a mandamus hearing was ordered in No. 99-1003 because of the delay. Given the APA violation, the court of appeals' determination that Graceba's *Petition for Action on Remand* somehow served as a waiver of all other remedies for all parties is not well considered.

The lower court's implicit determination that Graceba's 1998 gratuitous *Petition for Action on Remand* somehow waived statutory right to notice and comment and somehow waived constitutional right to equal protection is unsupportable. First, Petitioner twice requested the FCC to provide public notice of the constitutional and other issues remanded by the Court. *See* Graceba's June 30, 1997 letter to FCC; *see also Petition for Action on Remand*, at 1; *Reply*, No. 99-1437, at 13. The reme-dial suggestions in Graceba's *Petition for Action on Remand* were nothing more than "an attempt to move the process along and to ensure that all parties injured by the

Commission's unconstitutional bidding preference rules receive a remedy." *Petition for Action on Remand*, at 2; *Petition for Rehearing*, No. 99-1437, at 6. Second, Petitioner's *Petition for Action on Remand* does not constitute a waiver of its due process/equal protection rights. Petitioners' *Petition for Action on Remand* clearly seeks to vindicate constitutional rights, not waive them, and the *Petition for Action on Remand* does not stand as a barrier which prevents Petitioner from seeking "complete relief." *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.), *pet. for r'hrng denied*, 154 F.3d 487, 490, 491, *suggestion for r'hrng en banc denied*, 154 F.3d 494 (1998) ("complete relief" must be provided by the FCC in cases of impermissible discrimination). *Brief*, No. 99-1437, at 27.[26]

**B. The Constitution Requires Examination Of The Nature and Scope of Constitutional Violations**

The Supreme Court instructs that a three part analysis applies when exercising remedial authority in civil rights cases, *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995), and the remedy for a constitutional violation must satisfy constitutional due process requirements. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 100-01 (1993). First, the constitutional issue must be addressed because "equitable remedies . . . [are] determined by the nature and scope of the constitutional violation." The "principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself." *Missouri v. Jenkins*, 515 U.S. at 88. The FCC's failure to determine "the nature and the scope of the constitutional violation" fails to comply with the constitutional requirement that the constitutional violation be

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[26] *New York v. United States*, 505 U.S. 144 (1992) holds that a party which participates in the drafting and adoption of statutory material is not foreclosed from later challenging the constitutionality of that same statutory material. *New York*, 505 U.S. at 182-83.

directly addressed. *Brief*, No. 99-1437, at 12; *Petition for Rehearing*, No. 99-1437, at 9-10. While the FCC conceded the unconstitutionality of its preference program at oral argument at the court of appeals, *see e.g.*, Trans. at 32, ln. 17; Apdx. 215a, that concession does not relieve the government of the obligation to examine the unconstitutional action under the strict scrutiny required by *Adarand* in order to assess and to repair the damage caused by the illegal action.

Second, the remedy "must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Missouri v. Jenkins*, 515 U.S. at 88.[27] This constitutionally required directive instructs federal courts, and federal agencies, to make discriminated against parties whole. *See also Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.), *pet. for r'hrng denied*, 154 F.3d 487, 490, 491, *suggestion for r'hrng en banc denied*, 154 F.3d 494 (1998) ("complete relief" must be provided by the FCC in cases of impermissible discrimination). The requirement to make whole a party which has suffered illegal race/gender discrimination is a constitutional requirement.

> The Supreme Court has determined that
> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough

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[27] The third consideration in the remedy test, the interest of the government in the constitutional exercise of its powers, is not implicated here. The FCC's functions are not restricted other than by requiring the FCC to follow constitutional requirements.

to warrant use of a highly suspect tool.

*Adarand*, 515 U.S. at 226 quoting *Richmond v. J. A. Croson Co.*, 488 US 469, 493 (1989) (plurality opinion of O'Connor, J.). Instantly, neither the FCC nor the court of appeals bothered to examine the FCC's race and gender preference program, much less review it under the strict scrutiny standard, before imposing a "remedy" upon Graceba and other licensees. The approach selected by the FCC and the court of appeals which permits the application of a remedy without first determining the extent of the injury deprives Graceba and similarly situated parties of Fifth Amendment due process and equal protection and led to affirmation of the FCC's "remedy" which, as discussed in Section E below, was motivated by an improper concern to protect the reliance interests of the favored groups.

### C. Parties Suffering Constitutional Injury Must Be Made Whole

*Adarand* holds that

> all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

*Adarand*, 515 U.S. at 227.

In the context of gender-based preferences the Supreme Court holds that

> [T]he Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men). . .. [T]he reviewing must determine whether the proffered justification is exceedingly persuasive. The burden of justification is demanding and it rests entirely on the State. . . . The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the

achievement of those objectives.

*United States v. Virginia, et al.*, 518 U.S. 515, 532-33 (1996) (internal quotation marks and citations omitted).

Unlike other regulations which have a presumption of validity, the FCC's race-based preference regulations come under review as "inherently suspect" deserving of a "most searching examination" to see if the regulation is narrowly tailored to meet a compelling governmental interest. *Adarand*, 515 U.S. at 223. Gender based regulations require the government to demonstrate that its regulations are substantially related to an important governmental interest. *United States v. Virginia*, 116 S.Ct. at 533. A Federal agency "'must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted.'" *Adarand*, 515 U.S. at 220-21, quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Moreover, "it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989).

The FCC's stated purpose in adopting its race- and gender-based preference regulations was to "provide minority and women-owned firms with a significant advantage . . ." at the auctions. The "significant advantage" was provided regardless of the financial background of any particular preferred class member and regardless of the lack of actual discrimination against, or by, any party. *IVDS Fourth Report and Order*, 9 FCC Rcd. at 2337. The FCC's programs to promote various groups over others based solely upon race and gender violates due process and equal protection rights.

**D. Graceba Did Not Receive The Remedy It Sought**

The FCC's *Order on Remand* provides that

> We will eliminate from our rules the minority- and women-owned business bidding credits and will simultaneously grant credits of commensurate size to all winning small business bidders in the first IVDS

> auction. . . . [T]he conversion of race- and gender-based bidding credits to small business bidding credits resolves the issues presented by Graceba.

*Order on Remand*, 15 FCC Rcd. at 1533 & 1534¶¶ 60, 62; Apdx. 77a, 78a. While the quoted language states that the FCC's Remedial Bidding Credit addresses Graceba's constitutional issue, and while the FCC argued to the Court that the Remedial Bidding Credit provided constitutional relief to Graceba, *see* FCC *Brief*, at 9; Trans. at 27, ln. 5-6, 33 ln. 4-7; Apdx. 215a,[28] the FCC now holds that

> The arguments of Hughes and Ad Hoc Coalition are based upon the assumption that we accorded bidding credits to all small business as a direct remedy for race and gender discrimination. That is incorrect. In order to address the questions raised concerning the constitutionality of race- and gender-based bidding credits, we eliminated those credits. This was the extent of the "remedy" provided for Graceba's concerns. . . . The credit accorded small businesses thus solved a multi-faceted and complex set of regulatory issues. Those issues are not presented with respect to larger businesses. . . . [and] we therefore, have no obligation to extend to such companies the same approach we have adopted toward smaller businesses.

*Reconsideration Order*, 15 FCC Rcd. 25041 ¶ 44; Apdx. 202a-203a.

The FCC has flip-flopped on the issue of whether it provided the remedy Graceba requested thus making incorrect the panel's determination that "the Commission honored

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[28] At oral argument the FCC advised the Court that the FCC "chose the 25 percent discount as the remedy that it was going to give to equalize the parties which is, of course, exactly the remedy that they requested all along." Trans. at 33 ln. 4-7; Apdx. 215a.

precisely the remedial preference that Graceba advanced." *Memorandum*, at 2; Apdx. 4a, and the FCC's purpose appears to be to deny relief to some injured parties. While the FCC has provided Graceba with a 25% small business credit, the FCC now admits that it has not provided Graceba with the 25% bid reduction Graceba sought to remedy the unconstitutional discrimination. The "Remedial Bidding Credit" was established to protect reliance expectancies of the preferred groups which expectancies were obtained from discriminatory race and gender preferences. *Reconsideration Order*, ¶ 44; Apdx. 202a-203a. The panel indicated a concern if the "remedy had been no discount" because "the provision of a discount had a tendency to raise the ultimate price," but the panel found that since the FCC "equalized by giving you a discount, I'm not sure I see a problem." Trans. at 11, lns. 16-22; Apdx. 215a. The FCC now maintains that the "Remedial Bidding Credit" is not meant to remedy the constitutional violation at all and it is now clear that Petitioner did not receive the relief it requested.

The FCC's "remedy," which the FCC now claims does not include any refunds, fails to consider that because the auction was illegally conducted, licensees should have been afforded an opportunity to surrender their licenses for full refunds and loan forgiveness. The court of appeals incorrectly concluded that Graceba never sought the remedy of turning in its license for a full refund, *Memorandum*, at 1; Apdx. 3a. For instance, in addition to seeking to void the auction for a full refund in No. 96-1003, the case which led to the *Graceba Remand Order* in June 1997, Graceba sought a full refund in return for license cancellation in its June 30, 1997 letter to the FCC and Graceba's April 1998 *Petition for Action on Remand*, at 25, suggested adoption of an option for licensees to turn in their licenses for full refunds.

The Commission rejected cancellation of the licenses as a potential remedy for the unadjudicated constitutional violation because the remedy would be "disruptive and

unsuitable." *Order on Remand*, 15 FCC Rcd. at 1535 ¶ 63; Apdx. 79a-80a. The FCC's rejection of the license cancellation remedy as "disruptive and unsuitable" is completely without merit given the fact that the challenged *Order on Remand* adopts an "amnesty" program which permits licensees to turn in their licenses, albeit the down payments are forfeited.[29] *Order on Remand*, 15 FCC Rcd. at 1526 ¶ 47; Apdx. 64a-65a. Surrendering licenses is not at all disruptive. Because the FCC has not justified the use of race- and gender-based bidding credits at the auction, nor quantified the impact of those credits on the auction process as required by strict scrutiny analysis, Fifth Amendment due process requires that license cancellation/full refund be an option for injured licensees. However, some licensees may wish to hold their licenses for a properly discounted price and that option should also be available and a constitutionally acceptable price should be established for those licenses.

Mere retroactive elimination of the race- and gender-based bidding credits from the auction results not only fails to account for the effect of the unconstitutional credit on bid prices, it fails to account for the loss of the use of the money incurred by the injured licensees owing to their higher down payments compared to the preferred groups. The government could either issue interest compensation payments to the injured parties or it could require that the preferred groups pay interest on the amounts of their now rescinded bidding credits, but the government must do one or the other because the

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[29] Under the amnesty program the licensee forfeits its down payment, except that it will obtain a 25% refund of the down payment through the Remedial Bidding Credit. See FCC's November 6, 2000 letter to Mark J. Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit, No. 99-1437. The amnesty program was adopted purportedly because deployment of the IVDS service has not been successful. *Order on Remand*, 15 FCC Rcd. at 1506 ¶ 13; Apdx. 28a.

remedy "must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct," *Missouri v. Jenkins*, 515 U.S. at 88. Absent interest equalization, the preferred groups are unfairly advantaged. The fact that the FCC adopted the Remedial Bidding Credit to protect the preferred groups' reliance expectations, while doing nothing to provide for the injured parties' economic loss, demonstrates a discriminatory intent even if the Remedial Bidding Credit is applied to all small businesses. *Hunt v. Cromartie*, 119 S. Ct. 1545 (1999) (facially neutral rule violates the constitution if impermissibly motivated).

**E. Graceba Did Not Seek A Small Business Credit**

The court of appeals concluded that Petitioner was seeking "an additional" 25% discount in the captioned case and that Petitioner was precluded from seeking the discount from the Court because "Graceba did not request any such extra discount from the Commission prior to this appeal." *Memorandum*, at 1; Apdx. 3a. Graceba's *Petition for Action on Remand*, at 23, sought "the same 25% or 40%, as appropriate, bidding credit received by the preferred class." The FCC has clearly ruled that Petitioner received no bidding credit as a remedy for the constitutional violation. *Reconsideration Order*, 15 FCC Rcd. at 25041 ¶ 44; Apdx. 202a-203a. Petitioner never requested a small business bidding credit and the only reason there is a "second" 25% bidding credit in this case is because the FCC provided all small businesses with an unrequested 25% small business credit which the FCC established for the improper purpose of protecting the reliance expectancies of the very groups which had been advantaged on the basis of race and gender in the first place. *Brief*, No. 99-1437, at 26-7 n. 33; *Order on Remand*, 15 FCC Rcd. 1534 ¶ 61; Apdx. 78a; *Reconsideration Order*, 15 FCC Rcd. at 25041 ¶ 44; Apdx. 202a-203a; *Petition for Rehearing*, No. 99-1437, at 1-2. The FCC's continuing discriminatory purpose is also

evidenced by the fact that the FCC retains in its various rules race and gender-based preferences which have never been justified under strict scrutiny review. *See e.g.*, 47 C.F.R. § 2.110; 47 C.F.R. § 24.321; 47 C.F.R. § 24.711; 47 C.F.R. § 24.720. Graceba and the other injured licensees are entitled to a 25% discrimination discount, assuming that their money is not returned to them *in toto*, to provide a remedy for the illegal taking of their money seven years ago.

### F. Third Party Standing Is Not Required To Contest the FCC's *Order on Remand*

The circuit court incorrectly determined that Graceba must meet the third party standing test in order to contest the FCC's *Order on Remand*. *Memorandum*, at 3; Apdx. 4a. First, Graceba has standing in its own right to seek remedies for its own injuries caused by the FCC's race and gender discrimination; third party standing to contest the FCC's rulemaking action is simply not required. *See Omnipoint Communications, Inc. v. FCC*, 78 F.3d 620, 628 (D.C. Cir. 1996) (the allegation of a constitutional injury is sufficient to confer standing).[30]

Second, unexamined in the circuit court's *Memorandum* is the circuit court's decision in *National Association of Broadcasters v. FCC*, 554 F.2d 1118 (D.C. Cir. 1976) where the court invalidated an FCC fee collection program and ordered the FCC to make refunds to all parties, even those who were not "parties to this lawsuit." *NAB*, 554 F.2d at 1133.[31] *See e.g.*,

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[30] The court of appeals has determined that raising the issue of standing in the context of a rulemaking proceeding is "inexplicable," *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) and to the extent that a rulemaking proceeding affects a regulated entity, that regulated entity has standing to challenge the agency's rulemaking action.

[31] The court of appeals' decision in *NAB* was grounded in the Supreme Court's decision in *National Cable Television Association v. United States* (*NCTA*), 415 U.S. 336 (1974). *NAB*, 554 F.2d at 1123. In *NCTA* the Supreme Court remanded the case so that the FCC could justify its filing

Graceba's appellate *Brief*, at 13 and 19. Left unexplained in the *Memorandum* is any discussion explaining why the court of appeals required the FCC in *NAB* to refund all monies to all parties in light of the FCC's misapplication of a statute, while the same court of appeals determined in this case that the FCC may pick and choose not only which portion of the collected monies are subject to refund to remedy the constitutional violations, the court of appeals also determined that the FCC may pick and choose which victims of the FCC's race and gender discrimination are entitled to a remedy for the clear constitutional violations. The differing treatment between the regulated entities in *NAB* and those which suffered race and gender discrimination in the FCC's auction program violates Graceba's due process and equal protection rights.

To the extent that third party standing is relevant, Petitioner satisfies the three prong test of *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). First, Graceba has standing to challenge the *Order on Remand* to obtain the constitutionally required remedy which makes it whole. Second, Petitioner has a close relation to these third parties because in April 1998 Petitioner advised most of the representatives of the injured parties of its effort to obtain relief for the FCC's unconstitutional use of race- and gender-based bidding credits, Petitioner's desire for a common fund award was communicated at that time, and not a single injured party objected to Petitioner's effort to obtain relief and there is an implied

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fee schedule with regard to the then applicable "value to the recipient" standard found at that time in the statute authorizing the FCC's filing fee collection program. *NCTA*, 414 U.S. at 1150-51. In *NAB* the court of appeals required complete refunds even though some portion of the money taken by the FCC may have been, and most likely was, rightfully taken under the applicable statute.

representational relationship. *Brief*, No. 99-1437, at 40 n. 50.[32] Moreover, the injured parties that did not receive a remedy because they are not small businesses, are bound by the *Reconsideration Order*, and Petitioner and those injured parties are therefore in privity. *See Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1409 (D.C. Cir. 1985) (privity is established where "the relationship between one or more persons is such that a judgment involving one of them may justly be conclusive upon the others, although those others were not party to the lawsuit.").[33] Third, the reason that third parties cannot protect their own interests is that litigating against the FCC's affirmative action program is a politically sensitive matter which likely dissuades parties from litigating the issue. *Reply Brief*, No. 99-1437, 18-19 n. 15.

**G. Graceba Is Entitled To Common Fund Fees**

The court of appeals incorrectly concluded that Graceba

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[32] As discussed in footnote 50 of Graceba's appellate *Brief*, after the FCC issued its refund order, several benefitting parties now object to having to pay for services rendered.

[33] The FCC's May 3, 2001 *Weblink Wireless, Inc.*, DA 01-1143, ¶ 6 (WTB) decision dismissed a June 8, 2000 refund request filed by a narrowband/broadband PCS licensee on implied constitutional rights waiver grounds. It seems highly debatable whether the government may assume a waiver of constitutional rights where the federal agency fails to follow the APA's notice and comment procedures in establishing a remedy for the constitutional violations. The general rule is that the legal effect of Supreme Court decisions apply retroactively and that injured parties are entitled to relief. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96 (1993); *NAB*, 554 F.2d 1118 (D.C. Cir. 1976) (FCC required to refund improperly collected filing fees even to those parties who did not seek appellate relief). Graceba provided this legal argument to the FCC in its July 9, 1998 "Comments in Support of Application for Review" filed in DA 98-1008 (application for review filed by Community Teleplay, Inc.), but the FCC's *Weblink* order fails to address it. To counsel's knowledge, there is only one other PCS refund request pending before the FCC.

waived the claim for a common fund fee because Petitioner "did not initially ask for a common fund to be established and did not get the approval of other bidders to represent them." *Memorandum*, at 5-6; Apdx. 6a. As discussed above, the injured parties were advised in April 1998 that Graceba was seeking relief for them and also seeking a common fund fee and the panel is factually incorrect. However, the point is irrelevant because prior notice and class action are not prerequisites to awarding a common fund fee. The precedential effect of a ruling is sufficient to invoke the common fund doctrine. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166-67 (1939). *Petition for Rehearing*, No. 99-1437, at 11.

Graceba's *Brief* in No. 99-1437, at 37-40, states that the common fund doctrine ensures that litigation costs and risks are equitably spread to the parties which benefit from the legal services by assessing attorneys' fees directly against the recovered assets. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396-97 (1970). The establishment of a common fund ensures that the parties which benefit from legal services pay for them to prevent unjust enrichment. *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 127 (1885). The D.C. Circuit explains that the common fund doctrine

> allows a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees. It is by now well established that "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980). The underlying justification for attorney reimbursement from a common fund, as explained by the Supreme Court in three early cases, is that unless the costs of litigation were spread to the

> beneficiary of the fund they would be unjustly enriched by the attorney's efforts. *See Sprague*, 307 U.S. at 166-67; *Central R.R. & Banking Co. of Georgia v. Pettus*, 113 U.S. 116, 126-27, 28 L. Ed. 915, 5 S. Ct. 387 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532, 26 L. Ed. 1157 (1882).

*Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261,1265 (D.C. Cir. 1993). The court of appeals ignored this precedent, but relies upon a misreading of *National Council of Community Mental Health Centers, Inc. v. Mathews*, 546 F.2d 1003, 1008 (D.C. Cir. 1976). The *National Council* court determined that there could be no common fund award because the attorney sought to obtain the fee from unexpended Federal grant money, thus, the government was the owner of the money and not a mere stake-holder and there could be no common fund. *National Council*, 546 F.2d at 1007-08.

The *Memorandum*, at 5; Apdx. 6a, incorrectly states that the common fund claim in *National Council* was denied on due process grounds. What was denied on due process grounds was the attorney's alternative request for fees, after denial of the common fund claim, a fee claim which was premised upon assessments against individual beneficiaries rather than the common fund. The due process concern there was that the court lacked *in personam* jurisdiction over the beneficiaries. *National Council*, 546 F.2d at 1008. *National Council* does not hold that personal jurisdiction is a requirement in a common fund case nor that a formal fee arrangement is required between counsel and the beneficiaries of a common fund.

In common fund cases the formalities of litigation, such as a class suit and representation of the beneficiaries, is not a requirement because the object is to do "justice between a party and the beneficiaries of his litigation." *Sprague v. Ticonic National Bank*, 307 U.S. 161 at 166-67 (1939). The salient point is whether parties benefit from the litigation in an easily quantifiable manner. *Id.* An award of fees is appropriate even

if there is no judgment or consent decree entered, and even if the complaint is dismissed as moot, if a benefit is bestowed upon a class or classes of beneficiaries. *Kopel v. Wien*, 743 F.2d 129, 135 (2d Cir. 1984). *See also Reiser v. Del Monte Properties*, 605 F. 2d 1135, 1139 (9th Cir. 1979) (fees not precluded where defendant voluntarily takes action, favorable to plaintiff, that moots suit). The fact that an agency was the starting point of the litigation does not preclude the award of a common fund fee. *See Bebchick v. WMATA*, 805 F.2d 396, 401 (D.C. Cir. 1986) (court determines the common fund fee rather than remanding to the agency).

The court of appeal's does not cite any authority that a common fund claim must be asserted "initially" nor does the court of appeals explain when that point in time occurred given the FCC's failure to comply with the APA's notice and comment rulemaking procedures and the lack of a proceeding in which a claim could have been made. Graceba made the common fund fee request during the litigation, first with the FCC in March 2000 prior to the issuance of any refunds and then in its July 2000 *Brief* in No 99-1437. Moreover, the measure of successful representation in a common fund case is the monetary benefit bestowed upon beneficiaries *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993). The court of appeals failure to establish a common fund as requested failed to follow clear Supreme Court and its own precedent Graceba has been denied Fifth Amendment rights to due process and equal protection.

The FCC's flip-flop that the Remedial Bidding Credit does not remedy a constitutional violation does not mean that there is no common fund. It cannot seriously be maintained that the FCC would have issued the Remedial Bidding Credit in the absence of Graceba's litigation. *See Swedish Hospital Corp. v. Shalala*, 1 F.3d at 1270 ("HHS would have this Court ignore the fact that the government, left to its own devices, would have paid nothing to reimburse hospitals for their

photocopying expenses. HHS would also have us ignore the lengths to which the Department has gone, through repeated litigation, to avoid its statutory obligations in this matter."). Indeed, the FCC refused to grant relief to other injured parties, i.e., large IVDS licensees and the narrowband PCS licensees on "beyond the scope" grounds, *Order on Remand*, 15 FCC Rcd. at 1535 ¶ 64; Apdx. 80a, and the FCC has denied Weblink on an implied waiver of a constitutional rights theory. It was Graceba's litigation, and nothing else, which caused the FCC to order limited refunds and Graceba is entitled to a portion of whatever monies are ultimately refunded.[34]

## CONCLUSION

For the above reasons, Graceba respectfully requests that this Court grant Certiorari in this case.

Respectfully submitted,

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Hill & Welch
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202-775-0070/202-775-9026 (FAX)

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[34] The FCC violated the APA by failing to comply with rudimentary notice and comment procedures, but that did not prevent it from going "beyond the scope" to impose a constitutionally flawed remedy.

# APPENDIX

## APPENDIX

1. *Graceba Total Communications, Inc. v. Federal Communications Commission, Judgment*, No. 99-1437, released December 5, 2000 (D.C. Cir.) (unpublished).....1a

2. *Graceba Total Communications v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997) (*Graceba Remand Order*).....7a

3. *Report and Order and Memorandum Opinion and Order* (*Order on Remand*), 15 FCC Rcd. 1497 (FCC 1999).....14a

4. *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order* (*Reconsideration Order*), 15 FCC Rcd. 25020 (FCC 2000).....165a

5. *Order* (D.C. Cir. denying rehearing), released February 12, 2001.....214a

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term 2000

No. 99-1437

Graceba Total Communications, Inc.,
Petitioner

v.

Federal Communications Commission
and United States of America,
Respondents.

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On Petition for Review of an Order of the
Federal Communications Commission

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FILED DEC 5 2000

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Before: WILLIAMS. ROGERS AND TATEL, *Circuit Judges*.

***JUDGMENT***

This appeal was considered on the record from the Federal Communications Commission and on the briefs and oral arguments of counsel. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. *See* D.C. Cir. Rule 36(b). It is hereby

ORDERED and ADJUDGED that the petition for review of the September 1999 order issued by the Federal Communications Commission, extending a 25 percent bidding credit for Interactive Video and Data Service (IVDS) licenses

to all small businesses, be denied for reasons set forth in the attached memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/ MaryAnne McMain
MaryAnne McMain
Deputy Clerk

## *MEMORANDUM*

Graceba, a small business that is neither minority- nor women-owned, won two IVDS licenses in the Commission's July 1994 auction, in which businesses owned by minorities or women received a 25 percent bidding credit. The Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), seemingly requiring strict scrutiny for race-based preferences, assured that the Commission's credits would survive, if at all, only after protracted litigation. In September 1999, the Commission resolved the problem by extending the 25 percent bidding credit to all small businesses that participated in the IVDS auction. Remand Order, 15 FCC Rcd. 1497, 1533-34 ¶¶ 61-62 (1999). Graceba challenges this Remand Order on various grounds, and in addition seeks to recover attorneys' fees.

First, Graceba faults the Commission for having failed to give it an *additional* 25 percent discount. This plainly fails because Graceba did not request any such extra discount from the Commission prior to this appeal. See 47 U.S.C. § 405(a) (barring judicial review of "questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass"); *Bartholdi Cable Co., Inc. v. Federal Communications Commission*, 114 F.3d 274, 279 (D.C. Cir. 1997).

Graceba alternately (or perhaps additionally) argues that the Commission ought to have offered it the right to revoke its licenses, obtain a full refund, and avoid its loan obligations. But Graceba consistently petitioned the Commission to "place it in the same position as the preferred applicant class" by giving it the same 25 percent discount as had been provided to women and minority auction winners. Joint Appendix ("J.A.") at 92; see also *Graceba Total Communications, Inc. v. Federal Communication Commission*, 115 F.3d 1038, 1040 (D.C. Cir. 1997) ("*Graceba I*"). Graceba has never indicated that it wants

to give up its licenses for a complete refund; before the Commission it instead advanced its claim for a rescission remedy merely as a back-up to the remedy that it preferred and ultimately received. Graceba cannot demand a judicial remedy where the Commission honored precisely the remedial preference that Graceba advanced.

To supplement its unsuccessful claims on its own behalf, Graceba advances claims on behalf of others. Graceba tries to assert standing to make claims on behalf of three different groups—participants in the narrow band personal communications service (PCS) and regional narrow band PCS auctions, larger businesses that do not qualify for the remedial bidding credit, and "ineligible licensees," who, when they default on their debt, receive back all but their down payments (which are larger than those bidders who received race- and gender-based credits). Graceba does not satisfy the strict three-prong test for third party standing for any of these groups: (1) Because it received a remedial bidding credit, Graceba no longer has a "sufficiently concrete interest" in the litigation's outcome; (2) Graceba does not have a close relation to any of these third parties; and (3) There is no reason why the third parties cannot protect their own interests. See *Powers v. Ohio*, 499 U.S. 499, 410-11 (1991).

Graceba's claim for attorneys' fees under the Equal Access to Justice Act ("EAJA") also fails. A prevailing party "seeking an award of fees and other expenses" under EAJA has to file a claim "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). There are three conceivable final judgments in the present litigation: *Graceba I*, the completion of agency remand proceedings, and this decision. Cf. *Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991) (interpreting "final judgment" in the EAJA context to mean "a judgment rendered by a court that terminates the civil action for which EAJA fees may be received"). Disposition of the first and third

alternatives is the most obvious. If the procedural victory obtained in *Graceba I* constituted and EAJA-qualifying "final judgment", Graceba plainly failed to file a timely request. If Graceba has in mind the current judicial proceeding, and assuming incorrectly that the present outcome somehow renders it the "prevailing party," any request is premature.

There remains the possibility that Graceba regards the agency order now under review as the pertinent disposition, although it might seem odd for it both to seek review and to claim the status of "prevailing party." The only EAJA provision *before* judicial review is 5 U.S.C. § 504, see *Melkonyan*, 501 U.S. at 94-95. Graceba neither cites nor in any way explicitly invokes this provision, but in any event it calls for submission of the fee application "to the agency" within 30 days of the final disposition. 5 U.S.C. § 504(a)(2). That event occurred in September 1999, and Graceba has not made any such submission.

Lastly, there is the remote possibility that Graceba might fit itself within the narrow class of cases where fees are to be sought only after remand *and* return to court. The Supreme Court has held for "sentence six" Social Security cases—where the parties are expected to return to court—that "the filing period does not begin until after the postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs." *Melkonyan*, 501 U.S. at 102. We doubt very much if this could have any application: after *Graceba I*, the parties were not expected to return to court in the manner contemplated by *Melkonyan*. Because Graceba has made no argument whatever along these lines, however, we reject the claim without making any final interpretation of the relevant statutory provisions.

Graceba also invokes the fee-shifting provision of 42 U.S.C. § 1988, providing fees for winners of lawsuits under §

1982. Because Graceba never before suggested that it was suing under 42 U.S.C. § 1982, it cannot relitigate its claims now, on a new theory, simply for the purpose of securing eligibility for fees.

Graceba's final fees theory is that this court, using its jurisdiction in equity, should establish a common fund for fees. Under this theory, "if a party preserves or recovers a fund for his benefit and the benefit of others, he is entitled to recover his costs, including attorneys' fees, from the fund or directly from the other parties enjoying the benefit." *National Council of Community Mental Health Cente5rs, Inc. v. Mathews*, 546 F.2d 1003, 1008 (D.C. Cir. 1976) (noting due process concerns and refusing to establish a common fund). But like the attorney in *National Council*, who informed neither the court nor the class members that he would be seeking additional fees under a common fund, Graceba did not initially ask for a common fund to be established and did not get the approval of other bidders to represent them. See *National Council*, 546 F.2d at 1008-09; J.A. at 175 n. 22. Accordingly, it waived that claim.

For the above reasons, Graceba's petition for review is denied.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued January 17, 1997 Decided June 20, 1997

No. 95–1599

GRACEBA TOTAL COMMUNICATIONS, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

AD HOC IVDS COALITION, ET AL.,
INTERVENORS

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Consolidated with
Nos. 96–1003, 96–1004

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On Petitions for Review of an Order of the
Federal Communications Commission

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*Richard S. Myers* argued the cause for appellants. With him on the briefs was *Timothy E. Welch.*

*Susan L. Fox,* Counsel, Federal Communications Commission, argued the cause for appellees. With her on the briefs were *William E. Kennard,* General Counsel, *Daniel M. Armstrong,* Associate General Counsel, *C. Grey Pash, Jr.,* Counsel, *Joel I. Klein,* Acting Assistant Attorney General, U.S. Department of Justice, *Robert B. Nicholson* and *Robert J. Wiggers,* Attorneys.

Before: WILLIAMS, SENTELLE and TATEL, *Circuit Judges.*

Opinion for the Court by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Graceba Total Communications, Inc., petitions for review of a Federal Communications Commission order rejecting, among other claims, the company's constitutional challenge to a minority and gender preference rule employed in a license auction. Finding that the Commission erred in determining that Graceba's challenge to the rule was untimely, we remand the constitutional claim for further consideration.

## I

In July 1994, the Federal Communications Commission conducted a live, open-outcry auction of licenses to provide interactive video data service (IVDS) in local telecommunications markets. Permitting two-way data transmission over the radio spectrum, IVDS technology supports such commercial applications as home banking and shopping. Under rules promulgated in May 1994, businesses owned by members of racial minorities or by women received a 25 percent "bidding credit" at the auction. *In re Implementation of Section 309(j) of the Communication Act—Competitive Bidding, Fourth Report and Order,* 9 F.C.C. Rcd. 2330, 2336–39 (1994); 47 C.F.R. § 95.816(d)(1) (1996). Although Graceba won the two licenses for which it competed, it did not qualify for a bidding credit because it was neither minority- nor woman-owned.

After the Commission announced the auction results and the recipients of bidding credits in August 1994, Graceba petitioned for reconsideration, arguing that various auction practices had artificially inflated license prices. In February 1995, the Commission granted Graceba its two licences. While Graceba's petition challenging the auction was still pending in June 1995, the Supreme Court decided *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), holding that all government racial classifications—including those contained in federal programs designed to remedy race discrimination—are unconstitutional unless "they are narrowly tailored measures that further compelling governmental interests." *Id.* at 2113. *Adarand* expressly overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), where, using a more permissive standard, the Court had upheld the FCC's use of minority preferences in broadcast licensing. In an "Emergency Petition" to the Commission following *Adarand*, Graceba challenged the constitutionality of the IVDS auction's bidding credit rule, demanding a 25 percent reduction in the price of its licenses commensurate to that given minority- and women-owned businesses. Graceba stated that "the instant pleading should be considered in conjunction with [its earlier filed] *Petition for Reconsideration*." Emergency Petition for Relief and Request for Expedited Consideration at 2 n.2.

In December 1995, the Commission denied both of Graceba's petitions, along with those filed by other IVDS auction bidders. *In re Interactive Video & Data Service (IVDS) Licenses—Various Requests by Auction Winners*, 11 F.C.C. Rcd. 1282 (1995). With respect to the constitutional claim that Graceba raised in its Emergency Petition, the Commission explained:

> To the extent Graceba now challenges the Commission's [bidding credit] rule ..., we find that Graceba's challenge is an untimely petition for reconsideration. Petitions for reconsideration must be filed no later than 30 days after public notice of a Commission action. Public notice of the Commission's adoption of the rule in ques-

> tion commenced on May 13, 1994. Thus, Graceba's challenge should have been filed by June 13, 1994. Graceba's challenge was not filed until July 11, 1995. In addition, Graceba's petition does not demonstrate why it requires financial assistance under our 25 percent bidding credit rule. For example, its petition contains no evidence that it has faced discriminatory financial barriers to entry into the telecommunications industry.

*Id.* at 1285 (footnote and citations omitted).

Renewing the arguments made in each of its petitions, Graceba now petitions this Court for review of the Commission's order. Community Teleplay, Inc., and the Ad Hoc IVDS Coalition, representing a group of IVDS auction participants, intervened in support of Graceba's constitutional challenge to the bidding credit rule. Because Community Teleplay and members of the Coalition have a petition still pending before the Commission raising an identical claim, however, they must await the conclusion of those proceedings before bringing their claims here. *See, e.g., Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489–90 (D.C. Cir. 1994) (party that remains before agency cannot also bring challenge in court). Accordingly, although entertaining Graceba's petition, we dismiss those of intervenors. We must affirm the Commission's order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994).

## II

The Commission's primary reason for denying Graceba's second petition—that Graceba did not file it within 30 days of the May 1994 promulgation of the bidding credit rule—cannot support the Commission's order. Because "administrative rules and regulations are capable of continuing application," limiting review of a rule to the period immediately following rulemaking "would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1959). For this reason, we permit both constitutional and

statutory challenges to an agency's application or reconsideration of a previously promulgated rule, even if the period for review of the initial rulemaking has expired. *See, e.g., Public Citizen v. NRC*, 901 F.2d 147, 152 (D.C. Cir. 1990); *NLRB Union v. FLRA*, 834 F.2d 191, 195–97 (D.C. Cir. 1987); *Geller v. FCC*, 610 F.2d 973, 978 (D.C. Cir. 1979); *Functional Music, Inc., supra*. The Commission applied the bidding preference rule in its July 1994 IVDS auction, announcing which auction winners would receive bidding credits in an August 1994 order. Because Graceba was entitled to raise its constitutional claim in a petition challenging that order, the Commission erred in concluding that the claim was untimely simply because Graceba failed to raise it within 30 days of the agency's May 1994 rulemaking.

The Commission now maintains that 47 U.S.C. § 405, which imposes a time limit on petitions for reconsideration, precluded its consideration of Graceba's constitutional challenge because, although filed immediately after the Supreme Court decided *Adarand*, the petition was not brought within 30 days of any agency action, including public notice of the July 1994 auction results. However, not only does this reasoning appear nowhere in the Commission's order, *see Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (court must consider reasons given by agency in its order, not by agency counsel), but "section 405 has never been construed to be an absolute bar on [agency] reconsideration of issues raised after thirty days." *Meredith Corp. v. FCC*, 809 F.2d 863, 869 (D.C. Cir. 1987). Moreover, Graceba asked the Commission to consider its second petition "in conjunction" with its first, which was timely filed within 30 days of the August 1994 order. Because parties may supplement their pleadings in pending proceedings with agency approval, *see* 47 C.F.R. §§ 1.45(c), 1.106(f), the Commission clearly had the discretion to entertain Graceba's belated petition. *See Meredith*, 809 F.2d at 869.

We think the Commission exercised that discretion by going on to consider, though briefly, Graceba's claim that it was entitled to a 25 percent reduction in its license price. On that score, the Commission found that Graceba had failed to

"demonstrate why it require[d] financial assistance under the 25 percent bidding credit rule." *In re Interactive Video Data Service (IVDS) Licenses*, 11 F.C.C. Rcd. at 1285. But because nothing in the bidding credit rule requires recipients of bidding credits to make individualized showings of financial need or discrimination, *see Fourth Report and Order*, 9 F.C.C. Rcd. at 2337–39; 47 C.F.R. § 1.2110(b) (defining businesses eligible for bidding credit), the absence of evidence of such hardships in Graceba's case, standing alone, cannot support the agency's decision.

Claiming that the IVDS auction and the IVDS licence grants were final long before the Supreme Court decided *Adarand* and Graceba filed its constitutional claim, the Commission now argues that its rejection of Graceba's second petition was "consistent with established principles of finality and retroactivity." Respondent's Br. at 25. Whatever the force of this reasoning, *compare Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96 (1993)) (Supreme Court's interpretations of federal law "must be given full retroactive effect in all cases still open on direct review") *with Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1751 (1995) (for various "well-established legal reasons," such as finality principles, retroactive application of new rule of law may not determine outcome of case), like so many of the Commission's arguments in its brief, it appears nowhere in the Commission's order. As the Supreme Court has made clear, we "may not accept appellate counsel's *post hoc* rationalizations for agency action," *Burlington Truck Lines* 371 U.S. at 168, and are "powerless to affirm" agency action on "grounds [that] are inadequate or improper." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Because the Commission had a fair opportunity to consider Graceba's constitutional challenge, and because it did consider whether Graceba was entitled to the relief sought, we have jurisdiction to decide the issue ourselves regardless of whether the underlying petition suffered from procedural defects unaddressed by the agency. *See Meredith*, 809 F.2d at 869; *see also Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983). Rather than doing so,

however, we will remand Graceba's claim to the Commission for further consideration, without expressing an opinion on its merits. The Commission has an obligation to address properly presented constitutional claims which, like this one, do not challenge agency actions mandated by Congress. *See Meredith*, 809 F.2d at 872–74. Moreover, because this case raises questions about the finality of FCC licenses, fairness to auction participants not represented here, and other fact-specific, policy-laden concerns, we think its resolution would benefit from the agency's expertise.

## III

We have considered Graceba's non-constitutional arguments concerning the FCC's auction procedures, raised in its initial petition to the Commission, and find them without merit. Accordingly, the petition for review is granted in part and denied in part.

*So ordered.*

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Amendment of Part 95 of the | ) | WT Docket No. 98-169 |
| Commission's Rules to Provide | ) | |
| Regulatory Flexibility in the | ) | RM-8951 |
| 218-219 MHz Service | ) | |

# REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER

**Adopted:** September 7, 1999
**Released:** September 10, 1999

By the Commission:

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## I. INTRODUCTION

1. In a *Notice of Proposed Rulemaking* released September 17, 1998,[1] we undertook a comprehensive examination of the Commission's regulations governing the licensing and use of frequencies in the 218-219 MHz band. We sought comment on what actions we could take to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, encourage competition and provide services to the largest feasible number of users within the 218-219 MHz band.[2] We proposed measures to provide additional flexibility for the use of the service, in the belief that additional flexibility would further these goals.[3] We now address our proposed changes to the 218-219 MHz Service and the comments those proposals generated.

2. In this *Report and Order and Memorandum Opinion and Order (Report and Order)*, we modify our regulations governing the licensing of the 218-219 MHz Service to maximize the efficient and effective use of the 218-219 MHz

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[1] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064 (1998) (*218-219 MHz Flex Order*; *218-219 MHz Flex MO&O*; or *218-219 MHz Flex NPRM*).

[2] *Id.*, 13 FCC Rcd at 19066.

[3] While our proposals are designed to foster service in the 218-219 MHz band, the Commission makes no representations or warranties about the use of this spectrum for particular services.

frequency band.[4] We believe that these rule changes create a regulatory structure that will enable licensees to meet the public's current and future needs through the most technically and economically efficient use of this spectrum practicable.

3. Additionally, we address the constitutional issues raised by Graceba Total Communications, Inc., a winning bidder in the July 1994 auction of this service, that are before us on remand from the D.C. Circuit Court of Appeals (D.C. Circuit), as well as similar issues raised by commenters in this proceeding. We believe that the measures taken in this *Report and Order* are in the public interest and will resolve all outstanding issues concerning the 1994 auction.

## II. EXECUTIVE SUMMARY

4. The following is a synopsis of the major actions we adopt. In this *Report and Order*, we:

- Conclude that licensees can best design service offerings to meet market demand through the redesignation of the 218-219 MHz Service from a strictly private radio service (*i.e.*, a service that is used to support the internal communications requirements of an entity) to a service that can be used in both common carrier and private operations;

- Clarify that both one- and two-way communications and Response Transmitter Unit-to-Response Transmitter Unit (RTU-to-RTU) communications, regardless of regulatory status, is permitted in the 218-219 MHz Service;

- Extend the term of 218-219 MHz Service licenses to ten

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[4] *See* 47 C.F.R. Part 95, Subpart F.

years from the date of the license grant;

- Adopt a restructuring plan for existing licensees that (i) were current in installment payments; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules ("Eligible Licensees");

- Permit Eligible Licensees to choose (i) reamortization of principal and interest installment payments over a ten-year period; (ii) an amnesty option wherein Eligible Licensees surrender any licenses they choose to the Commission for subsequent auction and, in return, have all of the outstanding debt on those licenses forgiven; or (iii) a prepayment option whereupon licensees may retain or return as many licenses as they desire; however, licensees electing the prepayment option must prepay the outstanding principal of any license they wish to retain;

- Address petitions, comments and reply comments raising constitutional challenges to the Commission's race- and gender-based bidding credits used in the 1994 auction of this service;

- Eliminate from our rules the minority- and women-owned business bidding credits and simultaneously grant credits of commensurate size to all winning small business bidders in the 1994 auction of this service;

- Eliminate the three- and five-year construction benchmarks and adopt a "substantial service" analysis to be assessed at the expiration of the 218-219 MHz license term as a condition for renewal;

- Relax the license transfer restriction for licenses acquired by lottery;

- Remove the cross-ownership restriction and allow ownership of both frequency segment A (218.0-218.5 MHz) and frequency segment B (218.5-219.0 MHz) in the same service area;

- Permit partitioning and disaggregation of spectrum in the 218-219 MHz Service;

- Replace service-specific technical standards with regulations that are applicable to all permissible uses of the 218-219 MHz Service, but retain and modify the requirement that 218-219 MHz Service licensees provide absolute interference protection;

- Conclude that the Part 1 rules will govern competitive bidding issues in the 218-219 MHz Service;

- Retain the current small business size standards applicable to the 218-219 MHz Service.

5. Moreover, in a *Memorandum Opinion and Order*, we dismiss the petition filed by Interactive America Corporation ("IAC") on December 27, 1996, asking for reconsideration of rules we adopted for the second auction of 218-219 MHz Service licenses (Auction No. 13).[5]

## III. BACKGROUND

6. The 218-219 MHz Service is designated as a point-to-multipoint, multipoint-to-point, short-distance private radio service in which licensees may provide information or services to individual subscribers within a service area, and subscribers

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[5] Auction No. 13 was initially scheduled to commence on February 18, 1997. However, on January 29, 1997, the auction was postponed.

may provide interactive responses.[6] These systems use radio channels in the 218-219 MHz band for fixed and mobile services between the licensee's cell transmitter station (CTS) and the subscriber's response transmitter unit (RTU), or between two CTSs.[7]

7. The 218-219 MHz Service was initially designated the "Interactive Video and Data Service" (IVDS), and was established in response to a petition for rulemaking filed by TV Answer, Inc. (TV Answer) (now known as EON Corporation (EON)), that proposed interactive capabilities for television viewers.[8] The *1992 Allocation Report and Order*[9] established the 218-219 MHz Service with a 500 kilohertz frequency segment for two licenses in each of the 734 cellular-defined service areas.[10] The original licensing criteria the Commission established included: a five-year license term; restrictions on

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[6] 47 C.F.R. § 95.803(a).

[7] 47 C.F.R. §§ 95.803(b), 95.805(a)-(b), (e).

[8] Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services, GEN Docket No. 91-2, *Notice of Proposed Rule Making*, 6 FCC Rcd 1368 (1991) (*Allocation Notice*).

[9] Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video and Data Services, GEN Docket No. 91-2, *Report and Order*, 7 FCC Rcd 1630, 1630-33 (1992) (*1992 Allocation Report and Order*), *on recon.*, *Memorandum Opinion and Order*, 7 FCC Rcd 4923 (1992), *further recon.*, *Second Memorandum Opinion and Order*, 8 FCC Rcd 2787 (1993).

[10] *1992 Allocation Report and Order*, 7 FCC Rcd at 1630-33. The 218.0-218.5 MHz block is frequency segment A, and the 218.5-219.0 MHz block is frequency segment B. 47 C.F.R. § 95.853(a). These service areas consist of 306 Metropolitan Statistical Areas (MSAs) and 428 Rural Service Areas (RSAs). Thus, a total of 1468 licenses — consisting of 612 MSA licenses and 856 RSA licenses — were allocated for this service.

ownership of both frequency segments in a given market; and specific construction benchmarks.[11] In addition, based on the service model proposed by TV Answer, the Commission adopted specific technical requirements designed to reduce the potential for harmful interference to nearby operations, including reception of TV Channel 13 broadcasts in the 210-216 MHz band.[12]

8. We have issued 218-219 MHz Service licenses by both random selection (lottery) and competitive bidding (auction). On September 15, 1993, eighteen 218-219 MHz Service system licenses were awarded by lottery.[13] They were granted on March 28, 1994. In the Omnibus Budget Reconciliation Act of 1993 (*1993 Budget Act*), Congress authorized the Commission to award licenses for certain spectrum-based services by auction.[14] We subsequently determined that 218-219 MHz Service licenses should be awarded by competitive bidding and adopted rules and procedures for this licensing structure.[15] Using these

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[11] *1992 Allocation Report and Order*, 7 FCC Rcd at 1637-41.

[12] *Id.* at 1633-37.

[13] Public Notice, Interactive Video and Data Service Licenses Granted, Mimeo No. 42412 (released Mar. 30, 1994). The September 1993 IVDS lottery was permitted under the *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993) (*1993 Budget Act*), the pertinent applications having been accepted for filing by the Commission prior to July 26, 1993. *1993 Budget Act* § 6002(e).

[14] *1993 Budget Act* § 6002(e).

[15] *Second Report and Order*, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second Report and Order*), *on recon.*, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) (determining that 218-219

procedures, we held the first auction for 218-219 MHz Service licenses on July 28 and 29, 1994, covering the remaining licenses.[16] On January 18, 1995, and February 28, 1995, the Commission conditionally granted licenses to the winning bidders, subject to the bidder satisfying the terms of the auction rules, including down payment requirements.[17]

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MHz Service licenses should be awarded through competitive bidding and prescribing certain general rules and procedures to be used for all auctionable services); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994) (*Competitive Bidding Fourth Report and Order*), *on recon.*, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 19341 (1996) (*Competitive Bidding Sixth MO&O/Further Notice*) (establishing specific auction procedures for the 218-219 MHz Service, setting forth auction methodology and payment procedures, incorporating by reference many of the general rules and procedures set forth in the *Competitive Bidding Second Report and Order*, such as the installment payment and associated grace period rules, and establishing provisions such as installment payments to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "designated entities") are afforded a meaningful opportunity to participate in 218-219 MHz Service auctions).

[16] Public Notice, Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, Mimeo No. 44160 (released Aug. 2, 1994), *erratum*, Public Notice, Mimeo No. 44265 (released Aug. 9, 1994). A total of 594 MSA licenses were auctioned in the 298 MSAs that had not been licensed by lottery.

[17] *See* News Release, Interactive Video and Data Service (IVDS) Applications to be Granted January 18, 1995, Mimeo No. 51403 (Dec. 29, 1994) (listing first group of grants); Public Notice, Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995, 10 FCC Rcd 3388 (1995) (listing second group of grants). More recently, in the *Part 1 Third Report and Order*, we streamlined the general competitive bidding procedures to provide a uniform set of Part 1 provisions to be applied to all auctionable services, including the 218-219 MHz Service. *See*

9. Graceba Total Communications, Inc. (Graceba) – a winning bidder on two markets – filed two petitions challenging the 218-219 MHz Service auction methodology as artificially inflating prices and challenging the constitutionality of the bidding credits that were awarded in the auction.[18] Graceba did not qualify for a bidding credit. Graceba requested a twenty-five percent reduction in its total bid amount. In December 1995, the Commission denied Graceba's petitions.[19] Upon appeal by Graceba, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) remanded the constitutional issue to the Commission for further consideration.[20] In the course of Graceba's litigation, two other parties – Community Teleplay, Inc. (Community) and the IVDS Coalition (Coalition) – intervened in support of Graceba's constitutional arguments. An Application for Review raising these issues remains pending before the Commission.[21]

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Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (*Part 1 Third Report and Order*). The new Part 1 license-related payment rules apply to existing 218-219 MHz Service licensees effective March 16, 1998. *Id.* at 385. The summary of the *Part 1 Third Report and Order* appeared in the Federal Register on January 15, 1998 (*see* 63 Fed. Reg. 2315) so the revised license-related payment terms took effect on March 16, 1998.

18 *See infra*, para. 56.

19 *See* In the Matter of Interactive Video and Data Service (IVDS) Licenses, *Order*, 11 FCC Rcd 1282 (1995).

20 *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997).

21 *See* Application for Review of Community, filed June 29, 1998.

10. On September 4, 1996, Euphemia Banas, *et al.* (collectively, "Petitioners") filed a Petition for Rulemaking, seeking a change in the 218-219 MHz Service license term from five to ten years, with a corresponding extension of the installment payment amortization.[22] The Petition for Rulemaking was later amended with requests for regulatory relief on issues such as construction benchmarks, ownership limitations, and technical restrictions.[23] In order "to give the Commission an opportunity to consider [the] Petition for Rulemaking and numerous informal requests of potential bidders and license holders seeking to obtain additional flexibility for the service," the Wireless Telecommunications Bureau (Bureau) postponed a planned auction of 981 licenses

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[22] Petition for Rulemaking of Euphemia Banas, Trans Pacific Interactive, Inc., Wireless Interactive Return Path, LLC, New Wave Communications, LLC, Loli, Inc., Multimedia Computer Communication, Inc., Southeast Equities, Inc., Robert H. Steele, MAR Partnership, IVDS On-Line Partnership, A.B.R. Communications Inc., IVIDCO, LLC, Vision TV, Dunbar TV Corp., and Legacy TV, Inc. (Sept. 4, 1996) (Petition for Rulemaking). The Commission designated the Petition for Rulemaking as RM-8951. *See* Public Notice, Report No. 2166 (Nov. 22, 1996) (setting comment date of Dec. 23, 1996). Comments in support of the Petition for Rulemaking were timely filed by ITV, In-Sync, and Progressive Communications, Inc. (Progressive).

[23] *See* Letter Amendment to Petition for Rulemaking, RM-8951 (Jan. 28, 1997) (Letter Amendment); Second Letter Amendment to Petition for IVDS Rulemaking, RM-8951 (Feb. 26, 1997) (Second Letter Amendment); Third Letter Amendment to IVDS Petition for Rulemaking, RM-8951 (Mar. 13, 1998) (Third Letter Amendment). The IVDS License Holders Committee, an ad-hoc coalition, informally contacted Commission staff with similar requests. *See, e.g.*, Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau to Donald F. Lounibos, IVDS License Holders Committee (Jan. 8, 1997) (responding to issues raised by the Committee at a meeting held with Commission staff on November 13, 1996, and in a follow-up electronic mail correspondence). We received no comments in opposition to the Petition for Rulemaking.

that was to begin on February 18, 1997.[24]

11. Under the Commission's competitive bidding rules in effect at the time of the July 28 and 29, 1994, auction, winning bidders that qualified as small businesses were allowed to pay twenty percent of their net bid(s) as a down payment and the remaining eighty percent in installments over the five-year term of the license(s), with interest-only payments for the first two years, and interest and principal payments amortized over the remaining three years.[25] The first interest-only payment, due March 31, 1995, was deferred to June 30, 1995, pursuant to administrative action by the Office of Managing Director.[26] The Bureau further stayed the date for making the initial interest-only payments pending Commission resolution of licensees' substantive requests related to the

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[24] Wireless Telecommunications Bureau Postpones February 18, 1997 Auction Date for 981 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, 12 FCC Rcd 1389 (1997). The auction was announced on December 4, 1996, and was to consist of the unauctioned 856 RSA licenses, and 125 MSA licenses being reauctioned because the first auction winners were found in default. Auction of Interactive Video and Data Service (IVDS) – Auction Notice and Filing Requirements for 981 IVDS Licenses Scheduled for February 18, 1997, *Public Notice*, 11 FCC Rcd 20950 (1996). The Bureau announced postponement of the auction on January 29, 1997. Wireless Telecommunications Bureau Postpones February 18, 1997 Auction Date for 981 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, 12 FCC Rcd 1389 (1997).

[25] 47 C.F.R. § 95.816(d)(3) (1994) (incorporating by reference 47 C.F.R. § 1.2110 (1994)).

[26] "Quarterly Installment Payments for IVDS 'Auction' Licensees to Begin June 30, 1995," *Public Notice*, Mimeo No. 53031 (rel. Mar. 29, 1995).

payment requirements.[27] The Bureau lifted the stay effective January 5, 1996, on which date licensees were required to make the interest-only payments back-due from March 31, 1995 and June 30, 1995.[28] Although the interest-only payments due September 30, 1995 and December 31, 1995 remained uncollected,[29] we denied requests to set back the installment payment date and the first principal and interest payments were due on March 31, 1997.[30]

12. In the *1995 IVDS Omnibus Order*, the Commission cautioned licensees that if they individually required financial assistance, they should request a three- or six-month grace period during the first ninety days following any missed installment payments.[31] The Commission's rules in effect at that time provided that any licensee whose installment payment was more than ninety days past due was in default, unless the

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[27] Interactive Video and Data Service (IVDS) Licensees, Request for Stay to Postpone Commencement of Installment Payment Program, *Order*, 11 FCC Rcd 3031 (WTB 1995).

[28] Interactive Video and Data Service (IVDS) Licensees, Various Requests by Auction Winners, *Order*, 11 FCC Rcd 1282, 1284, n.23 (1995) (*1995 IVDS Omnibus Order*).

[29] In the *218-219 MHz Flex NPRM*, these interest payments were referred to as "Suspension Interest."

[30] *1995 IVDS Omnibus Order*, 11 FCC Rcd at 1285.

[31] *Id.* *See also* 47 C.F.R. § 1.2110(e)(4)(ii); "Wireless Telecommunications Bureau Staff Clarifies `Grace Period' Rule for IVDS `Auction' Licensees Paying By Installment Payments," *Public Notice*, 10 FCC Rcd 10724 (WTB 1995).

licensee properly filed a grace period request.[32] Licensees with properly filed grace period requests would not be held in default during pendency of their requests and the interest accruing would be amortized by adding it to the other interest payments over the remaining term of the license.[33] Upon expiration of any grace period without successful resumption of payment, or upon default with no such request submitted, the license would cancel automatically.[34] The Commission amended the grace period rules in 1998 to provide for two automatic grace periods of ninety days,[35] subject to late fees. The 1998 amendment of the grace period rules did not affect pending grace period requests filed by 218-219 MHz Service licensees.[36]

13. To date, since the grants of initial authorizations in the service, the deployment of the 218-219 MHz Service has not been successful; in fact, the vast majority of licensees have yet to provide service. We have also taken steps to promote development of the 218-219 MHz Service. These include removal of the one-year construction benchmark; waiver of additional construction benchmarks for both lottery and auction licensees; and authorization of mobile as well as fixed

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32 47 C.F.R. § 1.2110(e)(4)(ii) and (iii); *see also* 47 C.F.R. § 95.816(c)(6) for references to default (incorporating by reference 47 C.F.R. § 1.2104).

33 47 C.F.R. § 1.2110(e)(4)(ii)(iii) (1994).

34 *Id.*

35 *Part 1 Third Report and Order*, 13 FCC Rcd at 436. *See also* 47 C.F.R. § 1.2110(f)(4)(ii)(iii) (1998).

36 *218-219 MHz Flex Order*, 13 FCC Rcd at 19072.

operation on this spectrum.[37] However, with a few, limited exceptions, licensees have still been unable to offer services in the 218-219 MHz Service.[38] Moreover, those licensees actually deploying services are providing service different than that originally envisioned when the service was established.[39] In fact, several commenters also suggest that the concept of interactive television as originally envisioned when the Commission allocated the 218-219 MHz Service is no longer commercially viable.[40]

14. Against this backdrop, the Commission issued the *218-219 MHz Flex Order*, wherein it suspended the late payment fee and automatic cancellation provisions of Section 1.2110(f)(4) of the Commission's rules for 218-219 MHz Service licensees that had remitted adequate installment payments as of March 16, 1998, for the pendency of this rule

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[37] *See* Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for Interactive Video and Data Service (IVDS) Licenses, WT Docket No. 95-131, *Report and Order*, 11 FCC Rcd 2472 (1996) (eliminating the one-year construction benchmark) (*One-Year Construction Report and Order*). Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers, WT Docket No. 95-47, *Report and Order*, 11 FCC Rcd 6610 (1996) (*Mobility Report and Order*).

[38] *See, e.g.* MKS Interactive Comments at 5. A complete list of commenters and reply commenters to this proceeding is provided in Appendix A.

[39] *See* Community Comments at 3 (describing how Community "switched gears" after being unable to develop interactive television applications, and instead focused on wireless data applications for the 218-219 MHz Service).

[40] *See, e.g.*, CRSPI Comments at 2 (calling the original concept for IVDS "obsolete").

making.[41] We also stayed decisions on grace period requests properly filed under the pre-1998 rules until resolution of the issues in the *218-219 MHz Flex NPRM* and resolved several matters raised in petitions for reconsideration of the Commission's *Mobility Report and Order*.[42] We also redesignated this service as the "218-219 MHz Service" to reflect the breadth of services available with this spectrum, and requested comments concerning proposals for both payment restructuring options and changes to the 218-219 MHz Service rules that are intended to allow 218-219 MHz Service providers to fully utilize the service.[43] By the instant *Report and Order*, we largely adopt our proposals with the expectation that these rule changes will foster full and effective development and deployment of the 218-219 MHz Service.

## IV. DISCUSSION

### A. Regulatory Status and Permissible Communications

15. *Background.* As part of our examination of the ways to maximize the efficient and effective use of the 218-219 MHz Service, we sought comment on what actions are necessary to afford 218-219 MHz Service providers the opportunity to design or alter their service offerings in response to market demand. We tentatively concluded that this goal could be met by redesignating the 218-219 MHz Service from

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41 *218-219 MHz Flex Order, MO&O, and NPRM*, 13 FCC Rcd at 19066 & 19073.

42 *Id.*

43 *Id.*, 13 FCC Rcd at 19066, 19073, & 19075-80.

a strictly private radio service[44] to a service that can be used in both common carrier and private operations, and that such an approach would be consistent with Commission precedent.[45] We also sought alternative proposals that would accomplish this goal.[46]

16. *Discussion.* Commenters in this proceeding supported the proposition that 218-219 MHz Service providers should be given maximum flexibility to tailor their services to meet market demand.[47] Our proposal to provide maximum flexibility by allowing both common carrier and private operations met with near-unanimous support among

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[44] When the 218-219 MHz Service was initially allocated, we concluded that, because of the personal nature of these communications and the fact that they are offered to the public on a subscription basis to individual members of the general public, the service should be classified as a Private Radio Service. *Allocation Notice*, 6 FCC Rcd at 1370.

[45] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082. The Commission has previously determined that authorizing a wide variety of service offerings within a service comports with its statutory authority and serves the public interest. *See, e.g.*, Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12636 (1997) (*LMDS Second Report and Order*). *Cf.* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10798-800 (1997) (*WCS Report and Order*).

[46] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082.

[47] *See, e.g.*, Bay Area Comments at 2 (predicting that the 218-219 Service provides "a unique opportunity to demonstrate the extent to which market forces can replace regulation in the communications industry.")

commenters.[48] The Coalition noted that our proposal would allow 218-219 MHz Service providers the same freedom of choice of regulatory status as we have provided in other service areas.[49] The 218-219 MHz Licensees (218-219 MHz Group) agreed that our proposal would provide service flexibility.[50] Dispatch Interactive Television, Inc. (Dispatch) asserted that our proposal presents the best approach to ensure that 218-219 MHz spectrum is put to its highest and best use.[51]

17. AirTouch Paging (AirTouch), however, did not support our proposal. AirTouch predicts that 218-219 MHz Service providers may never offer the services as originally envisioned when this spectrum was allocated, and that providers are likely to offer other commercial services that generate greater revenue.[52] We will adopt our proposal to provide 218-219 MHz Service licensees with more flexibility. As Dispatch notes, our new rules will continue to allow 218-219 MHz Service licensees to provide services allowed under the current rules, but these entities will also have the flexibility to respond to market forces by offering additional or different services.[53] Our decision to give 218-219 MHz Service

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48 *See, e.g.*, MKS Comments, ¶ 7; CRSPI Comments at 6; Hughes Comments at 3; In-Sync Comments at 3; 219-219 Licensees Reply Comments at 5.

49 Coalition Corrected Reply Comments at 10; *see also* Dispatch Comments at 3; ISTA Comments at 17.

50 218-219 Group Comments at 2.

51 Dispatch Comments at 3.

52 AirTouch Comments at 4.

53 Dispatch Reply Comments at 4, n.7.

licensees additional flexibility is also consistent with our past treatment of the service. AirTouch correctly notes that in the *Mobility Report and Order*, the Commission considered and rejected proposals that we now propose to adopt.[54] First, we note that the Commission concluded in the *Mobility Report and Order* that the added flexibility of mobile operations would promote the development of service offerings not originally envisioned – or permitted under the service rules – when the 218-219 MHz Service was allocated.[55] Consequently, we believe that the *218-219 MHz Flex NPRM* represents a continuation of our efforts to provide licensees with additional flexibility that will allow the provision of services in the 218-219 MHz frequency band in response to market demand. However, we disagree with AirTouch's assertion that our past decisions prevent us from making the proposed changes.[56] As Community notes, we "gave plenty of reasons for this change" by showing the need (1) to accommodate a wide variety of service offerings, (2) to provide consistency and allow for a market-driven approach to service offerings, and (3) to allow for regulatory parity.[57] The need to provide additional flexibility to the 218-219 MHz Service is the underlying basis for the regulatory changes to the 218-219 MHz Service that we adopt today. Furthermore, we conclude that we are providing the "reasoned analysis" necessary for our revised 218-219 MHz

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[54] AirTouch Comments at 7. At that time, we identified several drawbacks to interconnection, including, *inter alia*, the impairment of the development of the service as envisioned and the resulting potential reclassification of the service as commercial. *Mobility Report and Order*, 11 FCC Rcd at 6621-22.

[55] *Mobility Report and Order*, 11 FCC Rcd at 6613-14.

[56] AirTouch Comments at 7.

[57] Community Reply Comments at 7.

Service rules, and no additional justification is necessary.[58]

18. In addition, we reject AirTouch's contention that our proposed rules would undermine the auction process, and specifically, the auction of Narrowband PCS (NPCS) licenses in which AirTouch was a winning bidder.[59] AirTouch argues that our proposal would undermine the auction process by eliminating the "fundamental regulatory differences" in permissible services, regulatory classifications, license flexibility, and power limitations.[60] It has been the Commission's consistent policy to continue to authorize new competition in the telecommunications market and to further serve the public interest by fostering diverse communications services.[61] The Commission previously concluded, for example, that incumbent Commercial Mobile Radio Service (CMRS) licensees had "no reasonable basis to expect that we

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[58] *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a `rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962)); *see also Northern Municipal Distr. Group v. Federal Energy Reg. Comm.*, 165 F.3rd 935 (D.C. Cir. 1999)). Because we have made the required connection between the facts we have found regarding the 218-219 MHz Service and the actions we take today, we conclude that we have met the applicable standard. *See also* Dispatch Reply Comments at 6.

[59] AirTouch comments at 5.

[60] *Id.*

[61] *See, e.g., LMDS Second Report and Order*, 12 FCC Rcd at 12636; Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624, 630-35 (1995) (*GWCS Second Report and Order*). *Cf. WCS Report and Order*, 12 FCC Rcd at 10798-800.

would limit the possibility of further entry" when we allocated the Wireless Communications Service (WCS).[62] We have repeatedly allowed for the provision of additional services in existing licensed services after concluding that it was in the public interest to do so.[63] All auctions applicants participate in the Commission's auctions process subject to a developing telecommunications market. Because we conclude that auction winners have no expectation that they will be shielded from potential competitors when the Commission determines that it is in the public interest to allow such potential competition – either through allocations or expansion of existing services – we find AirTouch's arguments are without merit.[64]

19. We also proposed to rely on 218-219 MHz Service providers to specifically identify the type of service they intend to provide within the technical parameters of the spectrum

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62 *WCS Report and Order*, 12 FCC Rcd at 10801.

63 *See, e.g., Mobility Report and Order*, 11 FCC Rcd 6610; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, FCC 98-231 (released Sept. 25, 1998); Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8965 (1996) (concluding that fixed services, excluding broadcast services, are permissible service offerings on spectrum allocated for broadband and narrowband CMRS).

64 We also reject AirTouch's argument that the Commission's freeze on paging applications should affect our decision with respect to the 218-219 Mhz Service because the paging freeze is outside the scope of this proceeding. AirTouch Comments at 8 (citing Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108 (1996)).

allocation.[65] Commenters generally support our efforts to allow them the flexibility to choose their regulatory status.[66] We will adopt Section 95.807 as proposed in the *218-219 MHz Flex NPRM* to provide for this choice. Mobile operation, first authorized in the 218-219 MHz Service by the *Mobility Report and Order*, is governed by Section 332 of the Act.[67] Under the rules we adopt, 218-219 MHz Service mobile service providers will elect regulatory status as either commercial or private under the definitions of CMRS and Private Mobile Radio Service (PMRS), as set forth originally in the *CMRS Second Report and Order*.[68] For fixed operations, they will elect

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[65] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082.

[66] *See, e.g.*, ISTA Comments at 18. *See also infra* para. 22 for a discussion of additional commenters who implicitly support the ability of a 218-219 MHz Service provider to choose its regulatory status, but who take issue with our proposed means for them to make this choice.

[67] 47 U.S.C. § 332. Section 3(n) of the Act, 47 U.S.C. § 151(n), defines "mobile service" to include (1) both one- and two-way radio communication service; (2) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations; and (3) the Personal Communications Service (PCS).

[68] Implementation of Sections 3 (n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1425-48 (1994) (*CMRS Second Report and Order*). Mobile radio services are regulated under Section 332 of the Act, which defines a commercial mobile service as any mobile service that provides service that is (1) on a for-profit basis, (2) interconnected, and (3) available to the public, 47 U.S.C. § 332(d)(1), and a private mobile service as any mobile service that is not a commercial mobile service or the functional equivalent thereof. 47 U.S.C. § 332(d)(3). Section 332 of the Act also states that providers of commercial mobile services shall be treated as common carriers for purposes of the Act. 47 U.S.C. § 332(c)(1). The *CMRS Second Report and Order*, in interpreting Section 332 of the Act, established CMRS to include the same three elements as the Act's

common carrier or private status based on the nature of their service offerings under the definitions set forth in Section 3 of the Communications Act of 1934, as amended.[69]

20. We cannot agree with EON's suggestion that we allow a 218-219 MHz Service provider to designate a "primary" status in these situations.[70] Rather, if a service offering falls within the statutory definition that encompasses

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commercial mobile service. The Commission also defined PMRS as "a mobile service that is neither a commercial mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service." The definitions of CMRS and PMRS are contained in Section 20.3 of the Commission's rules, 47 C.F.R. § 20.3. At the time of the *CMRS Second Report and Order*, mobile operations were prohibited in the 218-219 MHz Service, and therefore the Commission did not include the 218-219 MHz Service in its definition of commercial services. *CMRS Second Report and Order*, 9 FCC Rcd at 1424. Finally, we note that we are addressing similar concerns in regard to regulatory status in the CMRS in another open proceeding. *See* Amendment of the Commission's Rules to Permit Flexible Service Offerings for the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8965 (1996).

[69] Fixed common carrier operations are governed by the definition of "common carrier" in 47 U.S.C. § 153(10) ("any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier"), supplemented by 47 U.S.C. § 153 (43), (44), & (46) (defining "telecommunications," "telecommunications carrier," and "telecommunications service"). The Commission previously determined that the 218-219 MHz Service, under the rules previously in effect for the service, was a private fixed service not subject to common carrier regulation. *See* Christina Del Valle *et al*, *Memorandum Opinion and Order*, 11 FCC Rcd 2948 (1996).

[70] EON Reply Comments at 1.

common carrier status, the application and subsequent license would be subject to Title II and the common carrier licensing requirements of Title III of the Communications Act and our rules. Otherwise, services would be provided on a non-common carriage basis, and the application and the license would be subject to Title III and certain other statutory and regulatory requirements, depending on the specific characteristics of the service.[71] Any interested party will be able to challenge the regulatory status granted a 218-219 MHz Service licensee.[72] Our treatment of regulatory status will be consistent with our treatment of other wireless services.[73] Thus, for modifications that do not require prior Commission authorization – such as a change from non-common carrier status to common carrier status – we will require licensees to notify the Commission on FCC Form 601 within 30 days after the date the changes are made. To the extent that Title II of the Act restricts common carriers from discontinuing, reducing, or

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[71] *See, e.g., WCS Report and Order*, 12 FCC Rcd at 10847.

[72] See § 95.807(b) of the rules we adopt today. We have adopted a similar proposal in other services. *See, e.g.*, Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853 (1998).

[73] *See LMDS Second Report and Order*, 12 FCC Rcd at 12554-55 (1997); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943 (1997). *See also* Amendment to Parts 2, 15, and 97 of the Commission's Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications, *Memorandum Opinion and Order on Reconsideration and Notice of Proposed Rulemaking*, 13 FCC Rcd 16947 (1998) (*40 GHz NPRM*), Section 21.910 of our rules (47 C.F.R § 21.910) (describing a similar procedure for the Multipoint Distribution Service).

impairing service without prior Commission approval,[74] we will require both public notice and Commission approval prior to a change from common carrier to non-common carrier status. In this case, in addition to the application for modification on FCC Form 601, common carrier licensees must submit an attachment requesting authorization for discontinuance.

21. In the *218-219 MHz Flex NPRM*, we proposed to apply regulatory fees and license application requirements consistent with the election of common carrier or private status made by the licensee.[75] We note that in our recent proceeding that adopted the Universal Licensing System, we consolidated our procedural rules for the wireless radio services into a unified set of procedures, contained in Part 1 of our rules.[76] To the extent that 218-219 MHz Service licensees must submit information specific to the type of service it is providing (*i.e.* fixed or mobile, common carrier or non-common carrier), it must do so on FCC Form 601 and the appropriate schedule(s). We conclude that the regulatory approach we adopt for service offerings within the 218-219 MHz Service, while similar to proposals made by In-Sync Interactive Corp. (In-Sync)[77] and

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[74] 47 U.S.C. § 214(a).

[75] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082. *See also* Hughes Comments at 3.

[76] Amendment of Parts 0, 1, 13, 22, 24 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, WT Docket No. 98-20, *Report and Order*, 13 FCC Rcd 21027 (1998) (*ULS Report and Order*).

[77] In-Sync Comments at 4, n.7.

the 218-219 Group,[78] allows us to provide licensees the flexibility to choose their service offering while concurrently allowing the Commission to perform its statutory duty.

22. Commenters expressed an additional concern that our proposed requirement that licensees and applicants "specifically identify" their intended service offering in "sufficient detail"[79] would harm 218-219 MHz Service providers if they are forced to reveal detailed service information that could be used by others to gain a competitive advantage.[80] We recognize that there is a legitimate interest in protecting the confidentiality of business plans, but we also must be able to classify the regulatory status of a service provider. Because 218-219 MHz Service licensees will be able to change regulatory status by filing an application for license modification on FCC Form 601 and simply checking a box to indicate their regulatory status, we do not envision that our collection of regulatory information will have an adverse effect on licensees. Nevertheless, in those cases where an applicant or licensee believes that providing certain information would place it at a severe competitive disadvantage, it may request confidential treatment of its filings, pursuant to our rules.[81] Furthermore, for the benefit of those existing licensees who do not wish to make the disclosures necessary for us to provide additional flexibility in this service, we will classify those licenses for which an election has not been made under new

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78 218-219 Group Comments at 3.

79 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19083.

80 In-Sync Comments at 4; EON Reply Comments at 1; Coalition Corrected Reply Comments at 10.

81 *See* 47 C.F.R. §§ 0.457-0.459.

Section 95.807 of our rules as providing service on a solely private, non-common carrier basis, and will regulate those licenses accordingly.[82]

23. Because the 218-219 MHz Service was based on a model that envisioned two-way RTU-to-CTS and CTS-to-RTU communications, we clarify that both one- and two-way communications are permissible under our rules. We recognize that some proposed applications for the service – such as remote meter reading, vending machine reporting, and street light monitoring – may be based solely on one-way communications.[83] In response to additional comments, we further note that RTU-to-RTU communications are permissible regardless of the licensee's regulatory status,[84] and that this is one example of the type of permissible communication that licensees regulated under our CMRS rules might choose to provide.[85] Similarly, we will no longer prohibit interconnection in the 218-219 MHz Service, so long as a licensee chooses to be regulated as a service that permits interconnection.[86] The permissibility of one- and two-way communications may result

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[82] This procedure will not limit an existing licensee's ability to elect the regulatory status for its licenses under Section 95.807; rather, it provides an option for those licensees who believe that the competitive disadvantage associated with providing information for such an election outweighs the benefits of the additional flexibility in regulatory status and associated permissible communications.

[83] ITV Comments at 6; ISTA Comments at 9; Eagle Reply Comments at 2.

[84] Hughes Comments at 3-4; EON Reply Comments at 1.

[85] *See 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082, n.124.

[86] *See* CRSPI Comments at 6.

in applications that make the terms RTU and CTS less descriptive, but we decline to change our terminology, as Concepts to Operations, Inc. (Concepts) suggests.[87] Parties are familiar with the current terms, and the designations have not stopped the development of numerous innovative applications that have been proposed for use in the 218-219 MHz Service.[88]

24. Although we also sought alternatives that will ensure that 218-219 MHz Service providers can design their service offerings in response to market demand, no commenter offered an alternate proposal, nor are we persuaded by AirTouch's arguments for restricting the 218-219 MHz Service providers' ability to choose either common carrier or private operations.[89] Accordingly, we conclude that our proposal will provide an effective means of providing flexibility to 218-219 MHz Service providers, and we will allow both common carrier and non-common carrier uses in the service. By this action, we allow 218-219 MHz Service providers flexibility in both the scope of services they might provide and the means by which they may design their system to accomplish this. For example, our previous rules expressly prohibited common carrier service in the 218-219 MHz Service,[90] and structured the 218-219 MHz Service to disallow both direct RTU-to-RTU communications and mobile RTU interconnection with the public switched network or any commercial mobile radio

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87 Concepts Reply Comments at 3.

88 *See 218-219 MHz Flex Order*, 13 FCC Rcd at 19075 (discussing various uses for the spectrum).

89 ISTA suggests that the service "should not be limited" to the common carrier and private operations we proposed, but does not elaborate. ISTA Comments at 18.

90 Former rule 95.805(f), 47 C.F.R. § 95.805(f).

service.[91] We will now allow 218-219 MHz Service providers to design systems without these restrictions. The rules we adopt today are consistent with our past efforts to foster innovative uses for the 218-219 MHz Service.[92]

## B. License Term

25. *Background.* Under our current rules, the term of each system or CTS licensed to operate in the 218-219 MHz Service is five years.[93] The length of the license term was based on a concern "to reduce any potential for trafficking in licenses by persons who have no real interest in constructing," and to be "consistent with the license term used in most other private radio services."[94] To support their request for a ten-year license term, Petitioners note that (a) in services with similar technologies and market areas, the license term is ten years;[95] (b) the use of auctions to award licenses negates the original intent of the five-year term (*i.e.*, discouraging trafficking of lottery-won licenses);[96] and (c) awarding licenses by auction requires a longer license term in which 218-219 MHz Service

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91 Former rule 95.805(c), 47 C.F.R. § 95.805(c).

92 *See Mobility Report and Order*, 11 FCC Rcd 6610 (1996).

93 47 C.F.R. § 95.811(d).

94 *1992 Allocation Report and Order*, 7 FCC Rcd at 1641. The five-year license term conforms to the five-year license term of the General Mobile Radio Service, 47 C.F.R. § 95.105, and the Personal Radio Service under which the 218-219 MHz Service is classified, 47 C.F.R. § 95.1(c).

95 Petition for Rulemaking at 3-4.

96 *Id.* at 4. *See also One-Year Construction Report and Order*, 11 FCC Rcd at 2473.

providers (many of whom are small businesses) may secure adequate financing, develop viable services, and eventually recoup their initial investment.[97] Petitioners also contend that the extension of the license term would trigger a reamortization of the installment payments over the longer license term.[98] Consequently, they request that the Commission offer 218-219 MHz Service providers a choice of (a) fulfilling payment obligations with any changes associated with adjustments adopted through the *Notice*; (b) amnesty; or (c) payment through a royalty-based schedule as an alternative to auction payments.[99]

26. *Discussion.* There is uniform sentiment favoring

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[97] Petition for Rulemaking at 4-7.

[98] *Id.* at 9.

[99] *See* Third Letter Amendment (attachment at 3-4); *cf.* MKS Petition at 5 (requesting that all licensees in good standing be allowed to return their licenses to the Commission for a full refund). We chose to not seek comment on Petitioners' option of making royalty payments in lieu of installment payments for the same reasons that we explicitly rejected royalties as an auction payment mechanism in the past. *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2393; Implementation of section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rulemaking*, 8 FCC Rcd 7635, 7645 (1993); *see also* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7838 (1993). Specifically, the Commission stated, *inter alia*, that a royalty program would require adoption of complex, intrusive accounting rules for identifying the share of a firm's revenues that is attributable to a particular license, and send an erroneous message to bidders that the government (taxpayers) is better able to bear risk than the firm (shareholders). Furthermore, the Commission said that a royalty program making government revenues dependent on the success of a regulated service may give rise to conflicts of interest. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2382.

extension of the 218-219 MHz Service license term to ten years for all auction-granted licenses.[100] While the parties are in general agreement regarding extended license terms for auction-granted licenses, Community believes that similar treatment should not be accorded licenses awarded through the random selection process.[101] Community further states that lottery winners not meeting the original five-year construction benchmark or the "substantial service" benchmark within one year of renewal should forfeit their licenses.[102] The Coalition supports this view, stating that the Commission should allow lottery licenses to expire at the end of their five-year terms and then be re-auctioned because re-auction is the best and most straightforward way to prevent unjust enrichment of lottery licensees, and because it ensures that the 218-219 MHz licenses are efficiently allocated to those that value them the most.[103]

27. Contrary to Community's assertions, there is no reason to treat those who obtained their licenses by way of auction differently than those who obtained them by lottery. This finding is consistent with our past actions in the 218-219

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[100] Commenters and Reply Commenters expressly support extension; none oppose it. The 218-219 Group asserts that an extension of the term of all eligible licensees from five to ten years will advance the public interest by promoting small business participation, reducing barriers to entry, and enhancing competition. 218-219 Group Comments at 4-5. In-Sync supports a term extension because it will provide a more attractive time frame to investors and because other comparable services operate under ten-year license terms. In-Sync Comments at 5-6.

[101] Community also would retain the current benchmarks and assignability restrictions for such licensees (*i.e.* those awarded by lottery). Community Comments at 4, 11.

[102] *See* Community Comments at 2.

[103] *See* Coalition Reply Comments at 22.

MHz Service context when ruling on requests from both types of licensees for waiver of the Commission's rules regarding construction benchmarks.[104] In those instances we did not differentiate between the licensees when assessing whether a waiver was appropriate and whether enforcement of the construction benchmarks was contrary to the public interest. The imposition of a five-year license term and the construction benchmarks on IVDS licensees were both designed to reduce the attractiveness of licenses to entities interested in them only as a speculative vehicle.[105] Similarly, we did not differentiate in the case of Pioneer's Preference licenses. In those instances, although the licensees did not have to pay for the licenses, they remained subject to the same service and filing requirements.[106] We find that it is in the public interest to extend the license term of all licenses because this additional flexibility will allow for more efficient use of the spectrum. Restricting the license extension only to those who obtained licenses by auction may possibly create a competitive advantage in those licensees by granting to them additional time to further develop the service. Equity therefore weighs in favor of an extension of all license terms to ten years as proposed in the *218-219 MHz Flex NPRM*.

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104 *See* Requests by Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997, Construction Deadline, *Order*, 12 FCC Rcd 3181 (1997) (*Three-Year Lottery Benchmark Waiver Order*); Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998 and February 28, 1998 Construction Deadlines, *Order*, 13 FCC Rcd 756 (1998); Request of Licensees in the 218-219 MHz Service for Waiver of the Five-Year Construction Deadline, *Order*, 14 FCC Rcd 5190 (1999) (*Five-Year Benchmark Waiver Order*).

105 *See 1992 Allocation Report and Order*, 7 FCC Rcd 1630, 1641.

106 *See* Application of Nationwide Wireless Network Corporation, *Memorandum Opinion and Order*, 13 FCC Rcd 12914 (1998).

28. Moreover, as In-Sync has stated, a ten-year term would better enable lottery licensees to attract needed financing for system construction and operation.[107] Kingdon R. Hughes (Hughes) also expresses the belief that maintaining a five-year term for lottery winners would discourage construction.[108] We agree that incentives for equipment manufacturers to make the necessary investment to supply cost-effective equipment to the 218-219 MHz industry will be enhanced by the presence of large market operators ready to buy their products.

29. We find that auctionable service licensees should have consistent license terms. This position is in accord with Hughes, the Interactive Video Data Service Trade Association (ISTA) and ITV, Inc. and IVDS Affiliates, LLC (ITV), who maintain that a ten-year license term will promote regulatory parity.[109] In-Sync observes that licensees in the Multipoint Distribution Service (MDS), Point-to-Point Microwave Radio Services, Local Television Transmission Services and Digital Electronic Message Services are all granted ten-year authorizations. Once again, we have not altered our service rules in the past based upon how the licenses were acquired, and we decline to do so in this instance as well.[110] All 218-219 MHz Service licensees, therefore, should be accorded equal license terms to initiate service.

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[107] *See* In-Sync Reply Comments at 9.

[108] *See* Hughes Reply Comments at 2.

[109] *See* Hughes Comments at 4; ISTA Comments at 18; ITV Comments at 6.

[110] *See Fresno Mobile Radio Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999), where the D.C. Circuit held that the Commission could not differentiate between auction and non-auction licensees with regard to construction rules.

30. Further, we continue to believe that licenses in the 218-219 MHz Service can attract small businesses interested in opportunities to participate in the provision of spectrum-based services.[111] In this regard, a five-year term is particularly burdensome to small businesses paying for licenses using installment payments; to date, auctions have been held in four other wireless services in which certain designated entities were eligible for installment payment plans, and each of those services has a ten-year license term.[112] Hughes, ISTA and ITV maintain, and we agree, that a ten-year license term will help eliminate competitive inequities.[113]

31. Therefore, we amend our Rules to extend the term of 218-219 MHz Service licenses to ten years from the date of license grant. In doing so, we note that a ten-year license term comports with our proposal to redesignate the 218-219 MHz Service from a private radio service (generally licensed for a five-year term) to a service that can also provide common carrier services (generally licensed for a ten-year term). To ensure regulatory parity and because all eligible 218-219 MHz Service licensees will face the same competitive setting and opportunity costs going forward under the regulatory flexibility we have proposed (irrespective of whether they acquired their licenses by auction or lottery), we extend the license term of all licenses in the 218-219 MHz Service to ten years.

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[111] 47 U.S.C. § 309(j)(4)(D); *See Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2337; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2357.

[112] 47 C.F.R. § 24.15 (narrowband and broadband Personal Communications Services (PCS)); 47 C.F.R. § 90.149 (900 MHz Specialized Mobile Radio (SMR)); 47 C.F.R. § 21.929 (MDS).

[113] *See* Hughes Comments at 4; ISTA Comments at 18; ITV Comments at 6.

32. Finally, we believe we should extend the license terms to ten years of those licensees who were issued licenses on March 28, 1994[114] and who have timely filed renewal applications or timely filed waiver requests pending at the FCC.[115] During the original five-year license term, the Bureau suspended the three-year and five-year construction bench marks of these licensees pending resolution of the construction requirement. The Bureau found that enforcement of the three-year and five-year construction requirements would be unreasonable and contrary to the public interest because the proposed rule changes to the 218-219 MHz Service were "inextricably tied to [the licensees'] construction requirements and the mechanisms used to satisfy those benchmarks."[116] We see no reason to treat these licensees differently from the other licensees who will receive an extended license term. Accordingly, because of the unique circumstances of this case in that the proposed rule changes to the 218-219 MHz Service were inextricably tied to [the licensees'] construction requirements and the mechanisms used to satisfy those benchmarks, if the licensee has timely filed the appropriate license renewal form, we will extend the license term to ten years from the initial date of license issuance. If at the end of that time, the licensee has fully constructed its authorization and complied with all other Commission Rules, we will grant the license renewal. We will not grant any renewal application if the licensee fails to construct or place the station in operation

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[114] Eighteen licenses were granted to lottery winners on March 28, 1994.

[115] The licenses of all licensees who failed to file a timely renewal application automatically cancelled as of the expiration date without further action by the Commission.

[116] *Three-Year Lottery Benchmark Waiver Order*, 12 FCC Rcd at 3184; *Five-Year Benchmark Waiver Order*, 14 FCC Rcd at 5194.

before the end of the ten-year term.[117]

## C. Payment Options

33. *Introduction.* On January 18, 1995, and February 28, 1995, the Commission conditionally granted licenses to the winning bidders of the July 28 and 29, 1994, auctions,[118] subject to meeting the terms of the auction rules, including payment requirements.[119] As discussed above, licensees qualified as small businesses were permitted to pay eighty percent of their net bid(s) in installments over the five-year term of the license(s), with interest-only payments for the first two years, and interest and principal payments amortized over the remaining three years.[120] After a series of deferrals of the interest-only payments, the Commission required licensees to make their first interest and principal payments on March 31, 1997, or properly file a grace period request pursuant to the

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117 47 C.F.R. § 1.949 requires licensees to file applications for renewal no later than the expiration date of the authorization for which renewal is sought and no sooner than ninety days prior to expiration.

118 *218-219 MHz Flex Order*, 13 FCC Rcd at 19069. *See also* "High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses," *Public Notice*, Mimeo No. 44160 (rel. August 2, 1994), *Erratum*, Mimeo No. 44265 (rel. August 9, 1994).

119 *218-219 MHz Flex Order* 13 FCC Rcd at 13069. *See also* "Interactive Video and Data Service (IVDS) Applications to be Granted January 18, 1995," *News Release*, Mimeo No. 51403 (rel. December 29, 1994) (listing first group of grants); "Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995," *Public Notice*, 10 FCC Rcd 3388 (1995) (listing second group of grants).

120 *See* para. 11, *supra*. *See also*, 47 C.F.R. § 95.816(d)(3) (1994) (incorporating by reference 47 C.F.R. § 1.2110 (1994).

Commission's rules.[121] The licenses of those failing to take either of these actions cancelled, pursuant to the Commission's default rules.[122] In the *218-219 MHz Flex Order*, the Commission effectively suspended the payments for IVDS licensees that had remitted adequate installment payments as of March 16, 1998, and stayed decisions on grace period requests properly filed under the pre-1998 rules, pending resolution of the issues in the *218-219 MHz Flex NPRM*.[123] We also requested comments concerning proposals for payment restructuring options.

34. As described below, we adopt the payment restructuring proposals contained in the *218-219 MHz Flex NPRM* with some modifications. By this *Report and Order*, we establish a menu of three options that provides specific relief for licensees that wish to retain their licenses but are experiencing financial hardship or that wish to return their licenses due to an inability to assume their financial responsibilities. The three options are: (1) Reamortization and Resumption of Payments (Resumption), (2) Amnesty, and (3) Prepayment, whereby an eligible licensee may prepay the principal of any license it wishes to retain with cash and prepayment credits generated from down payments on spectrum returned to the Commission and any installment payments previously made.

### 1. Eligibility for Restructuring and Relief

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121 *218-219 MHz Flex Order*, 13 FCC Rcd at 13069.

122 47 C.F.R. § 1.2110 (1994).

123 *218-219 MHz Flex Order* and *NPRM*, 13 FCC Rcd at 19066, 19073.

35. *Background.* As of March 16, 1998, the effective date of the revised installment payment rules,[124] the installment payment portfolio for the 218-219 MHz Service consisted of: (i) licensees that were current in payments (i.e., less than ninety days delinquent) on March 16, 1998; (ii) licensees that had properly filed grace period requests under the former installment payment rules; (iii) entities that made some installment payments but that were not current in their installment payments as of March 16, 1998, and did not have grace period requests on file in conformance with the former rules; and (iv) entities that never made any installment payments.[125] In the *218-219 MHz Flex Order*, we stated that entities that had failed to remit adequate payments by March 16, 1998, or those that had failed to properly file a grace period request under the old rules were in default on their payment obligations and would be notified by the Bureau regarding debt collection procedures.[126] The *218-219 MHz Flex NPRM* proposed allowing non-defaulted licensees to participate in the financial restructuring options.[127]

36. *Discussion.* Most commenters specifically address the issue of eligibility for participation in the restructuring proposals. Nine of these propose expanding the available financial restructuring options to all entities, including those we proposed to treat as ineligible for participation, while three others indicate that only licensees falling within the *218-219*

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124 *Part 1 Third Report and Order*, 13 FCC Rcd at 442; 47 C.F.R. §§ 1.2110(f)(4)(ii), (iii).

125 *See 218-218 MHz Flex Order* 13 FCC Rcd at 19072 .

126 *Id.* at 19073.

127 *218-218 MHz Flex NPRM* 13 FCC Rcd at 19085.

*MHz NPRM* criteria should be eligible.[128] Some of the commenters supporting unrestricted eligibility note that subjecting all licensees to the original terms of their agreements would have draconian effects and unnecessarily penalize auction participants that have already lost invested funds.[129] Bay Area 218-219 MHz Group (Bay Area) and EON take a different tack, encouraging the Commission to provide an easy exit for "speculators" and other overtly unqualified licensees.[130] Two other commenters support eligibility for licensees that paid for the license up front, with refunds available to licensees seeking to return their licenses.[131] Finally, In-Sync proposes that licensees be given 120 days after adoption of the rules in this proceeding to sell their licenses to third parties, who would then be permitted to assume the seller's installment payment obligations at a discounted rate of either thirty-five percent (if the assignee were a "very small business") or twenty-five percent (if the assignee were a "small business").[132]

37. We decline to substantially modify the eligibility criteria proposed in the *218-219 MHz Flex NPRM*. Therefore,

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128 *See* IVDS/RLV Comments at 5; ITV Comments at 7; MKS Interactive Comments at 3; Bay Area Comments at 5; Hispania Reply Comments at 5; Interactive Reply Comments at 5; Eagle Reply Comments at 4; EON Comments at 1; IVDS Coalition Reply Comments at ii. (proposing restructuring options for all entities); and In-Sync Comments at 8; 218-219 MHz Group Comments at 3; ISTA Comments at 18 (proposing limited eligibility).

129 *See* Hispania Reply Comments at 5.

130 *See* Bay Area Comments at 4; EON Comments at 1.

131 *See* Hughes Comments at 2, 5-6; Hughes Reply Comments at 2; MKS Comments at 6.

132 In-Sync Comments at 8.

"Eligible Licensees" for the restructuring program outlined below are only (i) those licensees that were current in installment payments (i.e. less than ninety days delinquent) as of March 16, 1998,[133] or (ii) those licensees that had properly filed grace period requests under the former installment payment rules. Allowing the others to fully participate in the restructuring program would be unfair to licensees that have complied with the Commission's rules and made payments and/or properly filed grace period requests. Moreover, treating entities that have failed to follow the Commission's rules similarly to those that have made all of the required installment payments or followed the grace period rules could undermine the integrity of our rules and the auction process. The factors that led to the financial and technical difficulties of these former licensees, all of them small businesses, are unique to the 218-219 MHz Service and, we believe, unlikely to be repeated.

38. Nevertheless, we are cognizant that some entities have shown good faith by making late installment payments, while others have been incapable of working within the Commission's rules due to myriad intervening factors discussed previously in this *Report and Order*.[134] Accordingly, we will not fully enforce the original payment and default terms for former licensees in the 218-219 MHz Service that were not current in their installment payments as of March 16, 1998, and did not have grace period requests on file in conformance with

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[133] This group of licensees includes licensees from which the Commission accepted late payment of one or more installments prior to March 16, 1998. For purposes of the restructuring program we adopt today, we treat all licensees that were current in their installment payments as of March 16, 1998, the same. Thus, effectively we waived the payment deadlines for any late payers that became current before March 16, 1998.

[134] *See* paras. 8, 13 and 14, *supra*.

the former rules ("Ineligible Licensees"). Although their licenses automatically cancelled under our payment rules, the Commission will recommend that these entities receive debt forgiveness for their outstanding principal balance and accrued interest owed. Within the category of Ineligible Licensees, the Commission recognizes that certain licensees made some installment payments, albeit incomplete or late, while other licensees have not made any payments to the Commission. The Commission does not believe that the Ineligible Licensees that made some payments should be at a greater financial disadvantage under this *Report and Order* than licensees that never made any installment payments. Therefore, we recommend a refund of the installment payments made by the Ineligible Licensees, subject to Department of Justice approval.[135] We believe that this relief is appropriate under these circumstances. For purposes of future auctions that do not involve the extension of credit by the government, these former licensees will be deemed "former defaulters"[136] and eligible to participate provided that they can make the certification required under Section 1.2105(a)(2)(x) of the

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[135] Under the Federal Claims Collection Act and related regulations, only the United States Department of Justice ("DOJ") can compromise a claim in excess of $100,000. *See* Federal Claims Collection Act, 31 U.S.C. § 3711. *See also* 4 C.F.R. §§ 101-105. Because many of the debts that are subject to the proposed compromise exceed $100,000 and involve FCC licenses subject to common facts and circumstances, the Commission is recommending that DOJ approve the compromise of all 218-219 MHz Service debt as a package.

[136] *See* 47 C.F.R. § 1.2105(a)(2)(xi). *See also* Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Fourth Report and Order*, 13 FCC Rcd 15743, 15753, ¶ 18 (1998).

Commission's general competitive bidding rules.[137]

39. Finally, we will not offer the restructuring options to those that have paid in full for their licenses. The relief described below is not intended to undo the results of the auctions. Rather, we specifically provide restructuring relief to those experiencing financial difficulties. The relief is similar to that offered in the *C Block Restructuring Orders*, where the Commission chose to offer limited relief to licensees participating in the installment payment program but not to those who paid in full.[138] All licensees, however will benefit

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137 Whether these former licensees will be eligible for federal loan programs will be determined based upon U.S. Treasury regulations. Under the Debt Collection Improvement Act ("DCIA"), no person may obtain any federal financial assistance if the person has an outstanding debt with any federal agency which is in a delinquent status, as determined under standards prescribed by the Secretary of Treasury. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B. *See also* 31 C.F.R. § 285.13 (setting forth Department of Treasury regulations regarding delinquent debtors). In addition, in the *Part 1 Proceeding*, the Commission adopted a certification procedure as part of changes to the application procedures whereby applicants must certify that the applicant is not in default on any payment for Commission licenses (including down payments) and that it is not delinquent on any non-tax debt owed to any federal agency. Bidders that cannot make this certification may be ineligible for installment payment plans. *Part 1 Third Report and Order*, 13 FCC Rcd at 436, ¶ 8.

138 *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16436, 16450 (1997) ("*C Block Second Report and Order*"), and Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8358-60 (1998) ("*C Block First Reconsideration Order*") (collectively, the "*C*

from the added service flexibility we adopt today, including those that paid in full and are in the best position to use their licenses to provide service to the public. Furthermore, the added service flexibility should increase the ability of a licensee to sell a license in the secondary market, should a licensee that paid in full for its license no longer wish to be a licensee.

### 2. Reamortization and Resumption of Payments

40. *Background.* In the *218-219 MHz Flex NPRM*, we tentatively concluded that we should permit reamortization of principal and interest installment payments for non-defaulted 218-219 MHz Service licensees in conjunction with the extension of the license term from five to ten years, an approach that is consistent with our general auction rules.[139] Therefore, we proposed reamortization of installment payment terms for 218-219 MHz Service licensees to allow for two years of interest-only payments, followed by payments consisting of interest and principal over the remaining eight years of the license terms. In addition, to ensure that all 218-219 MHz Service licensees that are not currently in default can take advantage of the proposed reamortization of installment payments, we proposed granting all properly filed grace period requests as of the effective date of reamortization. This proposal would require recalculation of every non-defaulted licensee's installment payment obligations as reamortized, and applying all payments already received in accordance with the revised schedule, with any excess funds held in reserve for application against future installment payments.

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*Block Restructuring Orders*").

[139] 47 C.F.R. § 1.2110(f)(3)(ii) (as amended by the *Part 1 Third Report and Order*, 13 FCC Rcd at 521) ("[a]llow installment payments for the full license term"). *See also 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19078.

41. With regard to interest charges for 218-219 MHz Service licensees, we noted that Section 95.816(d)(2) of our rules requires the fixing of such charges at the time of licensing at a rate equal to the rate for five-year U.S. Treasury obligations.[140] We also proposed that the previously suspended 1995 September and December interest-only payments ("Uncollected Payments") would be paid with each of the first eight scheduled installment payments, as reamortized.[141] Under the *218-219 MHz Flex NPRM* proposal, licensees would choose to continue making installment payments by submitting a payment consisting of all accrued interest and principal (as reamortized) due and owing as of that date. At that time, if necessary, licensees would be able to utilize the two automatic ninety-day late payment periods in our installment payment rules, subject to the applicable late payment fees, before their licenses would automatically cancel as being in default.[142]

42. *Discussion.* Almost all commenters support reamortization and the resumption of payment proposals, but differ on issues ranging from scheduling to interest amounts.[143] The commenters primarily focus on the purported financial

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[140] *See* 47 C.F.R. § 95.816(d)(2).

[141] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19086; *Accord C Block Second Report and Order*, 12 FCC Rcd at 16450.

[142] 47 C.F.R. §§ 1.2110(f)(4)(i), (ii), (iii).

[143] IVDS/RLV Comments at 5; ITV Comments at 6; Community Comments at 12; 218-219 Group Comments at 6; In-Sync Comments at 7; ISTA Comments at 18; IVDS Enterprises Comments at 5; Coalition Reply Comments at 13. AirTouch does not specifically address the amortization and resumption of payment issues, but its comments are generally critical of new and flexible options for licensees in the 218-219 MHz Service. *See* AirTouch Comments and Reply Comments.

burden of restarting payments under the *218-219 MHz Flex NPRM*.[144] They note that under the proposal, licensees would receive the benefit of a ten-, versus five-year amortization, but they would be required to bring their balances current within ninety days of this *Report and Order*.[145] Accordingly, the Commission would require licensees to pay two years worth of principal payments, as well as the accrued interest, in a lump sum, within ninety days of this *Report and Order* to retain their licenses. The commenters suggest that the Commission provide additional relief to permit a readjustment period for the new rules and to allow licensees to make new capital arrangements.[146] Licensees provide five basic methods for such additional relief: (i) reamortization of the licensee's entire outstanding balance, including all then-accrued principal and interest payments, rather than requiring arrearages to be paid in the first payment following adoption of amended rules;[147] (ii) provision of an interest-only basis for the first five years, instead of the two-year period of interest-only financing proposed in the *218-219 MHz Flex NPRM*;[148] (iii) a ten-year payout schedule that would be entirely interest-free;[149] (iv) indexing interest charges to ten-year Treasury obligations

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144 IVDS/RLV Comments at 5; ITV Comments at 6; Community Comments at 12; 218-219 Group Comments at 6; In-Sync Comments at 7; ISTA Comments at 18; IVDS Enterprises Comments at 5; Coalition Reply Comments at 13.

145 *Id.*

146 *See* Coalition Corrected Reply Comments at 13.

147 *See* In-Sync Comments at 7.

148 *See* 218-219 MHz Group Comments at 6.

149 *See* CRSPI Reply Comments at 2.

effective as of the release date of the *218-219 MHz Flex Order*, instead of the licensing date, as stated in the *218-219 MHz Flex NPRM*;[150] and (v) delay the collection of reamortized installment payments of *any* kind for six months after adoption of new service rules.[151]

43. After consideration of the comments and replies in this proceeding, we will modify the reamortization and resumption of payment proposal contained in the *218-219 MHz Flex NPRM*. We will adopt the initial part of the proposal that provides for reamortization of principal and interest installment payments for Eligible Licensees in conjunction with the extension of the license term from five to ten years. This proposal received widespread support from commenters in this proceeding, and we believe that its adoption best serves the public interest. We are mindful, however, that reamortization may not provide sufficient relief standing alone to encourage licensees to resume payments. A crucial element of encouraging licensees to resume payments is ensuring that they will not be burdened with insurmountable first payments. We also note that in the *C Block Second Report and Order*, the Commission found that lump sum payments could place a significant burden on licensees.[152] Accordingly, we will reamortize a licensee's entire outstanding balance, including all then-accrued installment payments, rather than requiring all such arrearages to be paid in the first payments following adoption of this *Report and Order*.[153]

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150 *See* Coalition Reply Comments at 13.

151 *Id.*

152 *C Block Second Report and Order*, 12 FCC Rcd at 16450.

153 In-Sync Comments at 7.

44. Under the resumption option, the Commission will capitalize all accrued and unpaid interest into the principal amount as of the election date.[154] Accrued and unpaid interest will include the "Uncollected Payments" (*see* para. 11, *supra*). Any licensee electing resumption may be required to execute loan documents. Failure to fully and timely execute and deliver to the Commission (or its agent) any required loan documents within the time specified by the Bureau, will result in automatic cancellation of the license. Resumption of payments will not begin until the end of the third month after the Election Date,[155] giving licensees a minimum of 180 days after publication of this *Report and Order* in the *Federal Register* to make their first payment. Furthermore, under the current late payment rules for installment payments, licensees will have the option of utilizing the two ninety-day non-payment periods if they need additional time to avoid default.[156] We believe that licensees will have sufficient time to: (i) make an informed decision as to whether or not to elect repayment; (ii) obtain necessary capital; and (iii) begin repaying their financial obligations. We also find that providing these modifications will substantially increase licensees' flexibility to make market-driven decisions regarding their licenses and enable them to revise their business plans to make them more attractive to lenders and investors. Because payments will have been

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[154] This capitalization will take into account the Remedial Bidding Credit. *See infra*, para. 61.

[155] We refer to this date as the "Resumption of Payment Date." The "Election Date" is discussed further *infra*, at para 54. It refers to the date on which eligible licensees must elect one of the three restructuring options adopted in this *Report and Order*, and falls on the last day of the third month following publication of this *Report and Order* in the *Federal Register*.

[156] 47 C.F.R. §§ 1.2110(f)(4)(i), (ii), (iii).

effectively suspended from March 16, 1998, until the Resumption Date, we decline to grant requests to extend the two-year interest-only period to five years, as well as other extension requests. We will retain Section 95.816(d)(2) of our rules, thereby fixing interest charges equal to the rate for five-year U.S. Treasury obligations at the time of licensing, rather than the ten-year rate at the time of release of this *Report and Order*, as some commenters request.[157] Our decision to fix interest charges at the time of licensing is consistent with our general rules.[158] Furthermore, we believe that maintaining the interest rates at their initial level avoids administrative burdens and unnecessary hardships for licensees and the Commission. We note that the retention of the five-year interest rate fixed as of the licensing date is more favorable to the licensees than the application of the ten-year rate.[159] Changing the interest for all licensees would consume additional administrative resources as all of the loans would need to be recalculated as of the grant date and payments would need to be re-applied. Furthermore, the recalculation will result in additional unpaid interest due from Eligible Licensees. We delegate to the Bureau authority to set forth all procedures for implementing the resumption of payments.

45. In light of the provisions we adopt in this *Report and Order*, we need not adopt the proposal contained in the *218-219 MHz Flex NPRM* providing for the grant of all

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157 *See* 47 C.F.R. § 95.816(d)(2).

158 47 C.F.R. § 1.2110(f)(3)(i).

159 The interest rate is 'approximately one-eighth percent to three-eighths percent higher for ten-year treasury notes than for five-year treasury notes at the license grant dates.

properly filed grace period requests.[160] Instead, we dismiss all grace period requests. Parties that have filed valid grace period requests have effectively received the benefit of an extended grace period. Any improperly filed grace period requests are procedurally defective and are also dismissed. At this time we also dismiss as moot Community's "Emergency Motion for Stay" of implementation of the new installment payment rules.[161] Community had a properly filed grace period request pending at the time the Commission released the *218-219 MHz Flex Order*. Community requests a stay of the implementation of the 1998 grace period rules because it believes that application of the new rules to its situation might result in a default based on the expiration of the two ninety-day automatic grace periods.[162] The Commission made clear in the *218-219 MHz Flex Order* that late payment and license cancellation provisions were suspended in cases such as Community's, during the pendency of the rulemaking in this docket.[163] Given the resumption option provided herein, Community will not be at a disadvantage in following the 1998 grace period rules, and the suspension period is in excess of any grace period that might have been provided.[164]

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160 *218-219 MHz Flex NPRM*; 13 FCC Rcd at 19082.

161 "In the Matter of Community Teleplay, Inc., Segment B License in The Interactive Video and Data Service for the Norfolk-Virginia Beach Metropolitan Statistical Area," Emergency Petition for Stay, July 30, 1998. *See also*, "In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures," Petition for Reconsideration, Community Teleplay, Inc., January 20, 1998.

162 *Id.*

163 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19073.

164 47 C.F.R. §§ 1.2110(f)(4)(ii), (iii) (1999).

### 3. Amnesty

46. *Background.* In the *218-219 MHz Flex NPRM*, the Commission proposed permitting licensees to surrender any licenses they choose to the Commission for reauction and, in return, have all of the outstanding debt on those licenses forgiven (*i.e.*, an "amnesty" option).[165] Under the proposal, for each license returned under the amnesty option the licensee would choose either to (i) receive no credit for its down payment but remain eligible to bid on the surrendered licenses in the reauction, with no restriction on after-market acquisitions; or (ii) obtain credit for seventy percent of its down payment and forego for a period of two years from the start date of the next auction of the 218-219 MHz Service, eligibility to reacquire the surrendered licenses through either auction or any secondary market transaction. Under either option, all installment payments made on surrendered licenses, plus the seventy percent credit under the second option, would be applied to previously accrued interest for retained markets, with any excess installment payments (but not down payments) refunded, subject to applicable federal debt collection laws.

47. *Discussion.* All commenters addressing the issue of amnesty generally favor it, with most suggesting some modification of the *218-219 MHz Flex NPRM* proposals. We conclude that it is in the public interest to adopt an amnesty option that permits any Eligible Licensee to surrender any or all of its licenses in exchange for relief from its outstanding debt and waive any applicable default payments, subject to Department of Justice approval and pursuant to applicable

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165 *See 218-219 MHz Flex NPRM* 13 FCC Rcd at 19086. *See, e.g., C Block First Reconsideration Order*, 13 FCC Rcd at 8358-60.

federal claims collections standards.[166] Accordingly, Eligible Licensees may elect resumption, amnesty, or a combination thereof for all of the 218-219 MHz licenses they hold. We believe the amnesty option will speed use of the 218-219 MHz spectrum to provide services to the American public. The surrender of licenses under this option will provide qualified parties with an opportunity to obtain 218-219 MHz Service licenses at a future auction. The amnesty option we adopt today is in the public interest because, while amnesty relieves a licensee from further debt obligations and any applicable default payments, a coordinated surrender of licenses facilitates expeditious award of the spectrum through a future auction and will provide new market opportunities for all eligible entities. In addition, we note that rapid auction of those licenses surrendered will also comply with the Congressional directive that we promote competition and participation in the telecommunications industry by diverse entities.

48. EON seeks clarification of the combination amnesty and resumption option to allow a seventy percent credit and two-year abstention, and suggests that, if necessary, we broaden the disqualification period to exclude the future acquisition of *any* 218-219 MHz Service licenses to be auctioned in the ensuing two-year period.[167] We will maintain our initial proposal allowing for a seventy-percent credit and two-year abstention for surrendered licenses. We see no reason to prevent qualified licensees from bidding on other 218-219 MHz Service licenses, and to do so would unduly penalize licensees that choose this option. Moreover, denying these licensees the opportunity to participate in all auctions during the next two years would undermine the Commission's desire

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166 *See* 4 C.F.R. §§ 101-105.

167 *See* EON Comments at 1.

to provide maximum flexibility to licensees in developing their business plans. For example, a licensee may determine it is in its best interests to return some licenses to the Commission, retain some of its licenses and attempt to acquire other licenses near the ones it retains. By allowing licensees to make individual decisions of this nature, we believe that we will be meeting our obligation to facilitate provision of communications services to the public.

49. A large number of commenters raise the issue of parity, and claim that since licensees in the 218-219 MHz Service paid a twenty percent down payment rather than the ten percent down payment required of C block licensees, the Commission should return ten percent of the amount paid.[168] One licensee proposes surrender and a flat $2500 payment with no additional penalties. We will not return any portion of the down payment to eligible licensees electing the amnesty option, irrespective of the percentage difference between C block and IVDS down payments. We believe that permitting licensees to return spectrum and avoid the risk of future default with no further financial liability is a significant benefit. Moreover, we believe that refunding down payments would undermine the integrity of the auctions process by relieving participants of even the most basic obligation of their participation.[169] Such an

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[168] *See* Hispania Reply Comments at 5; Interactive Comments at 5; and Hughes Comments at 3. Hispania's Reply Comments refer incorrectly to 10 percent as the level of down payment made by successful bidders in the 1994 auctions.

[169] *Cf.*, Mountain Solutions LTD, Inc., *Order*, 12 FCC Rcd 5904 (1997) (*review denied*), *Memorandum Opinion and Order*, 13 FCC Rcd 21983 (1998); Carolina PCS I Limited Partnership, *Memorandum Opinion and Order*, 12 FCC Rcd 22938 (1997); C.H. PCS, Inc., *Order*, 11 FCC Rcd 9343 (1996); BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997), *petition for reconsideration granted in part and denied in*

approach would not only be unfair to the other participants, but would encourage speculation in future auctions.

50. Many licensees paid the installment payments due prior to March 16, 1998, after which installment payments effectively were suspended by the *218-219 MHz Flex Order*. We believe that due to the actions we take in this *Report and Order*, it would be unjust and inequitable to treat installment payments the same as we do down payments, especially because the most fiscally responsible licensees made installment payments while others did not. Consequently, where an Eligible Licensee has elected amnesty for some of its licenses and resumption for others, we direct the Office of the Managing Director to apply all installment payments associated with the returned spectrum to accrued interest on the retained licenses. Any excess funds should be applied to reduce the principal owed on retained licenses. Where a licensee elects amnesty for all of its licenses, we direct the Office of the Managing Director to refund the installment payments to the licensee, in accordance with procedures to be established by the Bureau and the Office of Managing Director on delegated authority. In addition, we will forgive payment of any due, but unpaid, installment payments for any surrendered license.[170]

**4. Prepayment**

51. *Background.* The *C Block Restructuring Orders*

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*part, Memorandum Opinion and Order*, FCC 97-300 (rel. Sept. 29, 1997). *See also*, National Telecom PCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 10163 (1997) (*review pending*).

[170] Forgiveness of this obligation will be subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards. *See* 4 C.F.R. Parts 101-105.

provided for this option and at least two commenters request a similar option.[171] Under the prepayment option in the *C Block Restructuring Orders*, any licensee was entitled to prepay the outstanding principal debt obligations for any licenses it elected to retain, subject to various restrictions.[172] The remaining licenses were required to be surrendered to the Commission for a future auction.[173] In exchange, the Commission forgave the debt on the surrendered licenses, and any associated payments owed. A licensee electing this option made its prepayment by using seventy percent of the total of all down payments made on the licenses it surrendered to the Commission, plus 100 percent of any installment payments previously paid for all licenses, plus any "new money" it was able to raise. The remaining portion of the down payment applicable to the surrendered licenses was not refunded or credited but retained by the Federal Government. Licensees were prohibited from bidding on their returned spectrum at auction or from reacquiring it in the secondary market for two years from the start of the next auction of C block spectrum. Licensees could, however, bid on spectrum surrendered by other licensees, provided such licensees were not affiliates.

52. *Discussion.* In-Sync specifically requests that we adopt a similar prepayment option.[174] Its proposal would allow first for the ten-year reamortization, then permit licensees the opportunity to choose whether to continue to pay in quarterly installments or pay the outstanding principal in a lump sum,

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171 In-Sync Comments at 7. *See also* 219-219 Group Comments at 9.

172 *C Block First Reconsideration Order*, 13 FCC Rcd at 8360.

173 *Id.*

174 In-Sync Comments at 7.

subject to a 25 to 35 percent bidding credit. In-Sync notes that this approach would reduce many of the administrative burdens associated with installment payments, such as collecting payments, processing grace period requests, procuring documentation from licensees, and coordinating with other federal agencies.[175] We find that In-Sync's reasoning here is sound, and the prepayment option would be a logical extension of the *218-219 MHz NPRM* proposals. Prepayment may make it easier for licensees to raise the additional capital necessary to build-out their systems and deploy new services by providing licensees with a means of eliminating debt. Thus, consumers benefit by receiving service sooner. Prepayment also removes the Commission from the role of lender. In addition, prepayment benefits the public because it assures taxpayers of full payment of licenses. Indeed, we have expressed our preference for prepayment by eliminating installment payments as a means of financing small business participation for the immediate future.

53. Although we will not adopt the precise prepayment option adopted in the *C Block Restructuring Orders*, we will provide similar relief here. Eligible licensees may retain or return as many licenses as they desire; however, licensees electing the prepayment option must prepay the outstanding principal balance for any license they wish to retain. Licensees will receive a prepayment credit equal to 100 percent of their installment payments and eighty-five percent of their down payments associated with the returned spectrum as credit on their retained spectrum. The uncredited portion of the down payment, fifteen percent of a twenty percent down payment, equals three percent of the purchase price. This percentage is

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175 *Id.*

equivalent to the three percent default penalty.[176] If the prepayment credit does not equal the outstanding principal amount, the licensee must submit additional funds on or before the Resumption Date in order to retain the license, subject to the Commission's full payment rules.[177] This option applies to all of the licenses a licensee holds and cannot be combined with the amnesty or resumption options.

### 5. Election Procedures

54. We conclude that Eligible Licensees electing one of the three restructuring options described in this *Report and Order* must file a written notice ("Election Notice") of such election with the Bureau on or before the Election Date [178] as specified in this section. Some commenters believe we should require winning bidders to expressly elect one of the two amnesty options proposed in the *218-219 MHz Flex NPRM* and that any failure to make an election should result in the automatic application of the original five-year payment schedule.[179] We will not adopt this measure because of its disproportionate financial effect. Eligible Licensees failing to make a specific election of any of the options by the specified Election Date will be placed automatically in the amnesty category. We delegate to the Bureau the authority to implement this *Report and Order*, including creating election

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176 *C Block Second Report and Order*, 12 FCC Rcd at 16466.

177 47 C.F.R. § 1.2109(a).

178 As explained in note 155, "Election Date" means the last day of the third month following the month on which this *Report and Order* appears in the *Federal Register*. The Bureau will provide more information concerning filing procedures in a subsequent public notice.

179 ITV Comments at 6.

procedures.

**D. Previous Provisions for Designated Entities**

55. *Background*: When the auction for what is now the 218-219 MHz Service was conducted on July 28 and 29, 1994, Part 95 of the Commission's rules included provisions to encourage participation by minority- and women-owned entities and small businesses.[180] Small businesses were entitled to pay eighty percent of their winning bids in installments.[181] Businesses owned by minorities and/or women were entitled to a twenty-five percent bidding credit that could be applied to one of the two licenses available in each market. Bidders that were both small businesses and minority- and/or women-owned entities could use installment financing as well as bidding credits.[182]

56. On August 2, 1994, the Commission announced the winning bidders in the IVDS auction, which included the recipients of bidding credits.[183] Graceba Total Communications, Inc. ("Graceba"), a winning bidder on two

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180 47 C.F.R. § 95.816(d).

181 This financing option was spread over a five-year term, with interest set at a fixed rate equal to that in effect for five-year U.S. Treasury notes on the day of issuance of a license. *See Competitive Bidding Fourth Report and Order*. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2390-91, ¶ 239.

182 *See Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2338-89, ¶¶ 46-47.

183 *See* "Announcement of Bid Amounts," *Public Notice* - Mimeo No. 44160 (rel. August 2, 1994) (*Bid Amount Public Notice*).

markets, did not qualify for a bidding credit.[184] On August 26, 1994, Graceba filed a petition for reconsideration ("Procedural Petition") of the *Bid Amount Public Notice*. Graceba argued that the auction had been conducted so as to artificially inflate prices.[185] In February 1995, prior to acting on the Procedural Petition, the Commission granted Graceba's licenses for the two markets in which it was the winning bidder. Subsequently, but while Graceba's petition was still pending, the U.S. Supreme Court decided *Adarand Constructors v. Peña ("Adarand")*,[186] holding that racial classifications are unconstitutional unless "narrowly tailored" and in furtherance of "compelling governmental interests."[187] Included in this category of classifications subject to "strict scrutiny" are those that are a part of federal programs aimed at providing remedies for race discrimination.[188] On July 11, 1995, Graceba filed an "Emergency Petition For Relief and Request for Expedited Consideration" ("Graceba Emergency Petition") challenging the constitutionality of the bidding credits on the basis of the *Adarand* case. Graceba requested a twenty-five percent reduction in its total bid amount, to place it on a par with those minority and women bidders that had received twenty-five

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184 The licenses acquired were for markets 283A (Panama City, FL) and 246A (Dothan, AL).

185 *See* Procedural Petition at 1-2.

186 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed.2d 158 (1995).

187 *Id.* at 227, 115 S. Ct. at 2113.

188 By adopting a strict scrutiny standard for race classifications, *Adarand* partially overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990) ("*Metro Broadcasting*"), in which "intermediate scrutiny" had been applied by the Court in upholding the Commission's use of minority preferences in broadcasting.

percent bidding credits.[189]

57. In December 1995, the Commission denied both of Graceba's petitions, along with those filed by other bidders in the 1994 auction seeking similar relief.[190] The Commission denied the Graceba Emergency Petition on the grounds that it constituted an untimely filed petition for reconsideration.[191] Upon appeal by Graceba, the D.C. Circuit upheld the denial of Graceba's Procedural Petition, but remanded the constitutional issues contained in the Graceba Emergency Petition to the Commission for further consideration.[192] On April 30, 1998, after the remand, Graceba filed with the Commission a "Petition for Action on Remand and Supplement to Emergency Petition for Relief and Request for Expedited Consideration" ("Remand Petition").[193]

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[189] *See* Graceba Emergency Petition at 14. In its Procedural Petition, Graceba had asked for a 40 percent reduction to the amount of its bid.

[190] *See* In the Matter of Interactive Video and Data Service (IVDS) Licenses, *Order*, 11 FCC Rcd 1282 (1995).

[191] *Id.*, 11 FCC Rcd at 1285.

[192] *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997). In *Graceba*, the Court remanded for further consideration the constitutional challenge to the race- and gender-based bidding credits used in the 1994 auction. Though not a commenter in this proceeding, Graceba raised issues in the Remand Proceeding that are similar to those asserted here by Community.

[193] Concurrently, Graceba filed a "Motion for Leave to File Supplement to Emergency Petition for Relief and Request for Expedited Consideration," which we grant.

58. In the course of Graceba's appeal, Community and the Coalition filed a petition to intervene in support of Graceba's constitutional arguments. However, since Community and certain members of the Coalition then had a "petition for relief" pending before the Commission raising identical issues, the Court dismissed the intervention petition.[194] The Bureau subsequently dismissed Community's petition, stating that petitioners should have objected to the payment conditions related to their licenses when they had first been issued in January and February 1995.[195] These petitioners then filed with the Commission an Application for Review, which is pending.[196]

59. *Discussion:* Although the Commission did not seek comment on the constitutional issues raised by Graceba and Community in their respective filings, several commenters make arguments in this proceeding related to those issues. Community and CRSPI ask that the Commission retroactively award discounts equivalent to the twenty-five percent bidding

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[194] *Graceba*, 115 F.3d at 1040 ("Because Community Teleplay and members of the Coalition have a petition still pending before the Commission raising an identical claim, however, they must await the conclusion of those proceedings before bringing their claims here"). Community requests that winning bids be reduced by 25 percent and that 25 percent of down payments be directly refunded. Community argues that any evidence of racial or gender discrimination is societal and that it does not originate with the Commission. They state that the bidding credits were not narrowly tailored, as required by *Adarand*. *See* Community Petition for Relief filed December 5, 1995 ("Community Petition").

[195] *See* In Re Community Teleplay, Inc., *et al.* Petition For Relief of Application of Bidding Credits in the Interactive Video and Data Service, *Order*, DA 98-1008, (rel. May 28, 1998).

[196] Application for Review of Community, filed June 29, 1998 ("Community Application for Review").

credit to entities not previously eligible to receive them in the IVDS auction.[197] Community cites *Adarand* and the decision of the D.C. Circuit in *Graceba* and requests that the Commission resolve the Community Application for Review prior to adoption of any new rules for the 218-219 MHz Service.[198] EON supports resolution of the Community Application for Review, either prior to, or contemporaneously with, this proceeding. We agree that the issues in the two separate filings are closely related. Accordingly, this *Report and Order* addresses the Graceba Emergency Petition, Remand Petition, the pending Community Application for Review, and the comments and reply comments that raise similar constitutional issues in this rulemaking.

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[197] EON supports the comments of CRSPI and Community and requests that the Commission grant a 25 percent refund or credit, at the licensee's option, to "all non-preferred class auction winners, not just those represented in Graceba's case." *See* EON Reply Comments at 3. The Coalition similarly asks for a retroactive refund or credit for bidders not receiving race- or gender-based bidding credits in 1994. *See* Coalition Reply Comments at 15-16, n.14.

[198] Petitioners maintain that concurrent resolution of the Community Application for Review and this rulemaking proceeding is necessary to forestall the need to again restructure installment payments at a later date. *See* Community Comments at 15. *See also* CRSPI Comments at 8. Further, Community maintains that failure to provide the relief it is requesting here and in the Community Application for Review will perpetuate what it maintains is "an unlawful taking" by the Commission. Community Comments at 14. *See also* Community Application for Review at 13-17. While we agree that a consolidated resolution of the related matter is advisable to address the payment reamortization issues, we see no merit in Community's "taking" argument, which likens the high bids voluntarily made in the auction to mandatory administrative assessments. *Id.* at 15-16. This argument fails to acknowledge the fundamental distinction between the exactment by a government agency of mandatory fees and the voluntary placing of an auction bid based entirely on a bidder's own evaluation of the fair market value of the licenses being auctioned.

60. Both Graceba and Community argue that the Commission has made no findings with respect to specific instances of past discrimination that might justify the use of gender- and race-based classifications.[199] The Commission previously focused on the constitutional ramifications of *Adarand* in the course of auctioning C block spectrum in the Personal Communications Service.[200] There, bidding credits similar to the ones used in the auction of what is now the 218-219 MHz Service had been adopted. Like the bidding credits presently under consideration, the C block bidding credits were adopted using the *Metro Broadcasting* intermediate scrutiny standard formulated prior to *Adarand*. In the *Competitive Bidding Sixth Report and Order*, the Commission acknowledged its concern that the record developed there would not adequately support the race- and gender-based provisions of the C block competitive bidding rules under a strict scrutiny standard.[201] To avoid the delay in the auction process that developing such a record would likely entail, coupled with the delay that the Commission anticipated would occur due to legal challenges to these provisions, the Commission decided to eliminate the race- and gender-based provisions for the C block auction and instead employ similar provisions for small businesses.[202] Subsequently, in order to determine whether adequate evidence exists to support such

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199 *See* Graceba Emergency Petition at 4.

200 See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Report and Order*, 11 FCC Rcd 136 (1995); *Erratum*, 11 FCC Rcd 5433 (1995) (*Competitive Bidding Sixth Report and Order*).

201 *See Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 143.

202 *See id.*

provisions, the Commission's Office of Communications Business Opportunities ("OCBO") commenced a series of studies to examine the minority and female ownership of telecommunications and electronic mass media facilities in the United States ("OCBO Studies").[203] Until completion of the OCBO Studies, it is premature to formulate even tentative conclusions as to the sufficiency of the ownership data being compiled to justify provisions for minority- and women-owned entities. However, while we continue to compile a record looking toward constitutionally appropriate means to encourage minority and female participation in telecommunications ownership, we will provide a remedy responsive to commenters and the issues raised in the Graceba Emergency Petition and the Remand Petition, as well as the Community Application for Review. We will eliminate from our rules the minority- and women-owned business bidding credits and will simultaneously grant credits of commensurate size to all winning small business bidders in the first IVDS auction.

61. To implement this decision, we will apply a twenty-five percent bidding credit ("Remedial Bidding Credit") to the accounts of every winning bidder in the 1994 auction of what is now the 218-219 MHz Service that met the small business qualifications for that auction.[204] The Remedial Bidding Credit

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[203] Studies currently underway include demographic reviews of the sale and transfer of wireless facilities and broadcast stations.

[204] Under 47 C.F.R. § 1.2110 (b)(1) (1994), a small business was an entity that "has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years." More recently, the Commission eliminated consideration of net worth and annual profits in favor of a gross revenue test and adopted a two-tiered small business definition. Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11

will be applied prior to computation of the reamortization or payment resumption features described in paras. 40-45. No action on the part of minority- and women-owned winning bidders will be required to implement this remedy. We note that there is no known negative impact on minority- and women-owned bidders because all such bidders also met the small business qualifications and are therefore not disadvantaged by our action. Small business winning bidders that did *not* utilize the installment payment option in the auction shall also be eligible to receive the Remedial Bidding Credit, and they will receive a refund of any resulting excess payment.

62. We believe that in this case the conversion of race- and gender-based bidding credits to small business bidding credits resolves the issues presented by Graceba. Regardless of race or gender, all small business winning bidders were eligible to pay for their licenses in installment payments in what is now the 218-219 MHz Service, so there is no need to invoke the strict scrutiny standard of *Adarand*. Thus, we believe it is appropriate to extend the further benefit of a bidding credit based solely on size.[205] These remedies are consistent with the approach to bidding credits taken in other post-*Adarand*

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FCC Rcd 19974, 19981-83 (1996) ("*Tenth Report and Order*"). For future auctions, a small business is an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years. 47 C.F.R. § 95.816 (d)(4)(i) and (ii).

[205] We note that our records reflect that the replacement of minority credits with small business credits will not result in the increase of any auction winner's debt.

auctions.[206]

63. In devising this remedy, we remain mindful of the need to avoid any major disruptions to the operations of existing 218-219 MHz Service providers and the public. We believe this remedy strikes a proper balance among all factors bearing our consideration, including the importance of finality as a principle in the granting of licenses, fairness to auction participants whose views are not represented in petitions or comments, and the good-faith reliance the Commission placed on then-valid U.S. Supreme Court precedent[207] and the *1993 Budget Act*[208] in adopting the minority and female bidding credits.[209] We reject the remedial options suggested by

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206 *See, e.g.*, 47 C.F.R. § 90.910 (800 MHz Specialized Mobile Radio); 47 C.F.R. § 90.810 (900 MHz Specialized Mobile Radio); 47 C.F.R. § 90.1017 (Phase II 220 MHz Service); 47 C.F.R. § 90.1103 (Location and Monitoring Service); 47 C.F.R. § 80.1252 (VHF Public Coast Service); 47 C.F.R. §§ 24.712, 24.717 (C, D, E and F Broadband PCS); 47 C.F.R. § 101.1107 (Local Multipoint Distribution Service); 47 C.F.R. § 27.209 (WCS).

207 *See supra.*, note 188.

208 In the *1993 Budget Act*, Congress enjoined the Commission to ensure that businesses owned by minorities and women are given the opportunity to participate in the provision of spectrum-based services, and, in this regard, directed us to consider the use of, among other things, bidding credits.

209 After the auction and the *Adarand* decision, the U.S. Supreme Court decided *VMI*. 518 U.S. at 515, 116 S. Ct. at 2264, 135 L. Ed. 2d at 735. Based on *VMI*, we concluded that the gender-based bidding credits used in the 1994 auction of what is now the 218-219 MHz Service are required to meet an intermediate scrutiny standard. *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19976 (1996) (*Competitive Bidding Tenth Report and Order*). Accordingly, upon

commenters such as the "condemnation" of licenses and the conducting of auctions *de novo* as disruptive and unsuitable alternatives,[210] given these other significant concerns. The relief we provide today is reasonably constructed to avoid major disruptions to the affected service.[211]

64. In light of our disposition of this case, we are dismissing the Community Application for Review as moot. To the extent Graceba has requested in its Remand Petition that the Commission alter rules and auction results in radio services for which Graceba is not licensed and has no interest, we find that Graceba lacks standing, and we deny such request. In addition, addressing rules relating to other radio services is beyond the scope of this proceeding.

## E. Service and Construction Requirements

65. *Background.* In the *218-219 MHz Flex NPRM*, we noted our commitment to eliminate possible barriers that would impede the maximization of efficient and effective spectrum use, and thus determined that strict construction requirements are not the most effective means to promote flexible uses of

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completion of the OCBO Study, we will measure the sufficiency of the evidence of minority and female ownership against the *Adarand* and *VMI* standards, respectively. In this regard, Graceba posits that strict scrutiny of gender-based bidding credits is required. *See* Graceba Emergency Petition at 8. However, the precedent cited by Graceba predates *VMI*.

[210] Boston/Houston suggests that the Congress or the Commission consider condemning or revoking the licenses in the 218-219 MHz Service band to compensate license holders for the investments they have made. *See* Boston/Houston Reply Comments at 6.

[211] *See National Fuel Gas Supply v. FERC*, 313 U.S. App. D.C. 293, 59 F.3d 1281 (D.C. Cir. 1995).

this spectrum.[212] Hence, we proposed to change the construction requirements in the 218-219 MHz Service to make these requirements consistent with those presently used in other services.[213] Specifically, we proposed to eliminate the three- and five-year construction benchmarks which are currently provided in our rules, and instead require licensees to provide "substantial service" to their areas within five years of license grant.[214]

66. In an effort to reduce the number of speculative application filings and the potential for spectrum warehousing, the Commission promulgated construction benchmarks in its original rules for the 218-219 MHz Service that required the deployment of service within five years of a license grant.[215] Specifically, licensees were required to construct a sufficient number of stations to cover ten percent of the population or land area within one year, thirty percent within three years, and fifty percent within five years.[216] Additionally, they were required to submit a status report on the construction of a system at the end of each benchmark.[217] Under our rules, a licensee who fails to satisfy the benchmark automatically loses

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212 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19088.

213 *See LMDS Second Report and Order*, 12 FCC Rcd at 12659-12661; *WCS Report and Order*, 12 FCC Rcd at 10841-10844.

214 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19088-89.

215 *Id.*; *see also* 47 C.F.R. § 95.833.

216 47 C.F.R. § 95.833(a).

217 47 C.F.R. § 95.833(b).

its authorization.[218]

67. In 1996, the Commission eliminated the one-year construction benchmark. The Commission concluded that this benchmark was not necessary to prevent spectrum warehousing because the introduction of auctions discouraged this practice.[219] Further, the Commission indicated that removing this benchmark would promote greater flexibility in selecting service options, obtaining financing, selecting equipment, and other considerations related to the construction of their systems.[220] The Bureau later waived the three-year construction benchmark for all licenses in the 218-219 MHz Service determining that enforcing the benchmark while this policy was under review would be unreasonable and contrary to the public interest.[221] Recently, the Bureau waived the five-year

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218 47 C.F.R. § 95.833(a). Each 218-219 MHz Service system licensee must make the service available to at least 30 percent of the population or land area within the service area within three years of grant of the 218-219 MHz Service system license, and 50 percent of the population or land area within five years of grant of the 218-219 MHz Service system license. Failure to do so will cancel the 218-219 MHz system license automatically. For the purposes of this section, a CTS is not considered as providing service unless that CTS and two associated RTUs are placed in operation.

219 *One-Year Construction Report and Order*, 11 FCC Rcd at 2473. The one-year construction benchmark was waived for 17 of the 18 licensees that received their licenses as a result of the September 1993 lottery.

220 *Id.*

221 Requests by Interactive Video and Data Service Auction winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines, *Order*, 13 FCC Rcd 756 (WTB 1998); Requests by Interactive Video and Data Service Lottery winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181 (WTB 1997).

construction benchmark for all 218-219 MHz Service licenses with five-year construction benchmark deadlines ending on March 28, 1999, as well.[222] The Bureau again noted that the rules affecting the buildout criteria may ultimately change as a result of the instant rulemaking proceeding and, therefore, concluded that waiving this benchmark requirement would be reasonable, would promote efficient use of the spectrum, and would be in the public interest.[223]

68. *Discussion.* Most commenters support our proposal to eliminate the three- and five-year construction benchmarks and replace them with a "substantial service" construction requirement.[224] Specifically, 218-219 MHz Licensees, In-Sync and Hughes indicate that the current benchmarks are unnecessary and may result in artificial buildout, forcing licensees to spend money on equipment that may not meet the needs of its systems to comply with administrative deadlines.[225] Thus, the commenters favor a

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222 *See Five-Year Benchmark Waiver Order.*

223 *Id.*

224 ITV Comments at 10-11; 218-219 MHz Licensees Comments at 11-12 and Reply Comments at 9; Hughes Comments at 6 and 7; In-Sync Comments at 10 and Reply Comments at 7; ISTA Reply Comments at 19; EON Reply Comments at 1. We acknowledge that some commenters requested clarification of what satisfied the construction benchmarks with regard to types of transmissions and in terms of construction. Given the outcome of this proceeding, we conclude that it is not necessary to address these issues, in the context of the benchmarks pursuant to the five-year license term, as they are now irrelevant. We will instead lend guidance to licensees as to what will satisfy the construction benchmarks pursuant to the ten-year license term.

225 218-219 MHz Licensees Comments at 9; In-Sync Comments at 10; Hughes Comments at 6.

more flexible approach to construction benchmarks, urging the Commission to avoid rules that encourage artificial buildout requirements.[226] We agree with the commenters that eliminating the three- and five-year construction benchmarks for all 218-219 MHz licensees serves the public interest, and thus replace it with a "substantial service" analysis.

69. We believe that a "substantial service" analysis would be the best method to encourage the construction of facilities in unserved markets. In the *218-219 MHz Flex NPRM*, we solicited comment on a definition for "substantial service," as well as "safe harbor" examples of substantial service showings.[227] In-Sync suggests that we define "substantial service" to include services provided to businesses or industries that indirectly provide service to the public.[228] Furthermore, In-Sync requests a definition broad enough to include consumer services as well.[229]

70. Upon reviewing the record, we conclude that the public interest would be best served if we define "substantial service" as a "service that is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal."[230] Additionally, to facilitate licensees in their

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226 CRSPI Comments at 6; Boston/Houston Comments at 11.

227 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19088-89.

228 In-Sync Comments at 10.

229 *Id.*

230 *LMDS Second Report and Order*, 12 FCC Rcd at 12660; *WCS Report and Order*, 12 FCC Rcd at 10843-10844; In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on*

efforts to comply with this standard, we will consider the following "safe harbor" examples in determining whether a 218-219 MHz Service licensee has provided substantial service: (a) a demonstration of coverage to twenty percent of the population or land area of the licensed service area; or (b) a demonstration of specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers; or (c) a demonstration of service to niche markets or a focus on serving populations outside of areas currently serviced by other licensees. We have taken this approach in the past with respect to other services.[231]

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*Reconsideration and Third Report and Order*, WT Docket 96-18, FCC 99-98 (1999); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18621-18625 (1997); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 11015-11021 (1997); Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool and Implementation of Sections 3(n) and 322 of the Communications Act, *Third Order on Reconsideration*, 11 FCC Rcd 1170-1171 (1995).

231 *See LMDS Second Report and Order*, 12 FCC Rcd at 12660; *WCS Report and Order*, 12 FCC Rcd at 10844; Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool - Implementation of Section 309(j) of the Communications Act, GN Docket No. 93-252, *Third Order on Reconsideration*, 11 FCC Rcd 1170 (1995); Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool – Implementation of Section 309(j) of the Communications Act – Competitive Bidding and Implementation of Sections 3(n) and 322 of the Communications Act, GN

Furthermore, we believe that these examples are reasonable and will offer the flexibility licensees need to develop and provide service to various populations that are currently unserved. We recognize that this list of examples is not exhaustive. Hence, we will review the record of the licensee in its entirety and will assess each case individually at renewal.

71. Earlier in this *Report and Order*, we determined that amending our rules to allow a ten-year license term for the 218-219 MHz Service would best serve the public interest by ensuring regulatory parity among the licensees.[232] In the *218-219 MHz Flex NPRM*, we, under a ten-year scenario, proposed to require that all 218-219 MHz Service providers either make service available to at least twenty percent of the population or land area, or demonstrate substantial service, within ten years of license grant.[233] Alternatively, we asked whether, in lieu of establishing benchmarks, we should require licensees to provide substantial service to their service area within ten years of the license grant as a condition of renewal. Furthermore, we sought comment on whether to require incumbent licensees to comply with a five-year substantial service benchmark five years from the effective date of rules promulgated pursuant to this instant proceeding and the ten-year requirement at the end of their ten-year license term.

72. We received mixed responses to these proposals. The majority of commenters suggest that we conduct our "substantial service" assessment at the end of the license term

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Docket No. 93-252, *Second Report and Order and Second Further Notice of Proposed Rule Making*, FCC 95-159, 10 FCC Rcd 6884, 6887 (1995).

232 *See supra*, para. 31.

233 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19089.

as a condition of renewal, as this period will provide a complete record for Commission review.[234] ITV indicates that the public interest is not served by having two construction deadlines falling within a short period of time, and therefore the public interest would be best served with one assessment at the time of license renewal.[235] Hughes disagrees with our proposal that a twenty percent coverage of land area or population should be imposed.[236] Hughes urges the adoption of a single "substantial service" standard.[237] ISTA, on the other hand, states that either standard – "substantial service" or twenty percent coverage – is adequate to motivate development of the service.[238]

73. Both Community and EON request that we retain the five-year construction benchmark for lottery winners in the top nine markets, favoring extension on a case-by-case basis.[239] Community states that lottery-won licenses should be extended for five years only after construction benchmarks have been

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234 ITV Comments at 10-11; In-Sync Comments at 10; 218-219 MHz Licensees Reply Comments at 11. It should be noted that although the 218-219 MHz Licensees favored a "substantial service" five-year construction benchmark in its original comments, its reply comments supported a "substantial service" assessment at license renewal.

235 ITV Comments at 10-11.

236 Hughes Comments at 6 and 7.

237 *Id.*

238 ISTA Reply Comments at 6.

239 Community Comments at 8 and Reply Comments at 2; EON Comments at 1.

met.[240] According to Community, auction-won licenses should be extended upon following clear "safe harbor" provisions that define "substantial progress" for auction licensees.[241] Community proposes that we require auction winners to reach the "substantial service" benchmark at year six of the extension.[242] EON disagreed with our proposal to extend the buildout or service requirement to ten years for lottery-won licenses because the extension may slow development since the return on investment is not an incentive for fast development for lottery-won licenses as in the case of auction-won licenses.[243]

74. We disagree with the approaches suggested by Community and EON. Retaining two separate requirements for lottery-won licensees and auction-won licensees does not facilitate our efforts to streamline the service rules and ensure regulatory parity among all of the 218-219 MHz licensees.[244] One commenter, who owns both lottery- and auction-won licenses, notes that it makes no sense to require buildout for the lottery market at an earlier time than the auctioned market.[245]

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240 Community Comments at 10.

241 *Id.* at 10-11.

242 *Id.* at 11.

243 EON Comments at 1.

244 *See* Fresno Mobile Radio, Inc. v. Federal Communications Commission, 165 F.3d 965 (D.C. Cir. 1999) (*Fresno*). The Court remanded the case to the Commission because two different standards for buildout were required for auction license winners and incumbents (non-auction winners).

245 Hughes Reply Comments at 5-6.

We agree. Although we have expressed concern about system development among lottery winners in the past, we believe that they will have incentives, reasonably similar to those of auction winners, to utilize this spectrum efficiently to maximize the economic opportunities that their licenses create.[246] Moreover, we are confident that both types of licenses – lottery winners and auction winners – will be able to build systems and provide competitive services, given the increased flexibility provided by the rules in this *Report and Order*.

75. Section 309(j)(4)(B) of the Communications Act mandates that we promote investment in and rapid development of new technologies and service by means of performance requirements, such as deadlines and penalties for performance failures.[247] We believe that the approach we are adopting today better achieves this mandate than the buildout requirement that had been in place until now. Given that five years has already passed and the three- and five-year benchmarks were suspended, a single benchmark requirement of substantial service at renewal is warranted. Furthermore, we will require licensees to file supporting documentation showing compliance with the construction requirements at the time of renewal. Failure to demonstrate that "substantial service" is being provided will result in a license not being renewed. We believe that these requirements will offer maximum flexibility, providing a more realistic opportunity for current and future 218-219 MHz licensees to meet their construction obligations and provide high quality wireless services to the public.

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246 *See Fresno*, 165 F.3d at 969. The Court deemed "foolish," the notion that incumbents (non-auction license winners) have less incentive than auction license winners to quickly utilize the spectrum.

247 47 U.S.C. § 309(j)(4)(B) (1999).

## F. License Transferability

76. *Background.* In September 1993, eighteen licenses were awarded by lottery. As a strategy to reduce license "trafficking" and the filing of speculative applications, the Commission prohibited the transfer of a 218-219 MHz license until the system's five-year construction benchmark (fifty percent coverage) had been met.[248] This prohibition does not, however, apply to 218-219 MHz Service licenses that were acquired through the competitive bidding process.[249]

77. In the *218-219 MHz Flex NPRM*, we sought comment on whether we should retain the license transfer restriction for lottery-won licenses.[250] In the event we retain the license transfer restriction, we sought comment on the manner in which the restriction should be applied in light of the proposed service rule changes involving the construction benchmarks and the partitioning and disaggregation of 218-219 MHz Service licenses.[251]

78. *Discussion.* Most commenters support a total elimination of the license transfer restriction imposed on

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248 47 C.F.R. § 95.819(b).

249 *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2335, 2343; *see also* 47 C.F.R. § 95.819(a) (noting that transferability of auction won licenses is governed by Section 1.2111 of the Commission's rules).

250 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19090.

251 *Id.*

lottery-won licenses.[252] In-Sync states that this elimination will increase ownership flexibility.[253] Furthermore, the 218-219 MHz Group and Bay Area indicate that the license transfer restriction is based on obsolete "anti-trafficking" concerns and that lifting the restriction will ensure regulatory parity among all 218-219 MHz eligible licensees.[254]

79. Community urges that we retain our current restriction against license transferability because such rules discourage speculative sales of licenses and encourage system construction buildout.[255] Community also states that lottery licensees that do not wish to construct a 218-219 MHz system, should return the license to the Commission to be re-issued by way of competitive bidding as opposed to private sale.[256]

80. The Commission's initial concerns for imposing the license transfer restriction (*i.e.*, "trafficking") are no longer relevant. Previously, we were concerned that licensees would acquire licenses for the sole purpose of reselling them to reap a profit, with no intention of building systems to provide service to the public. In light of this concern, we placed limitations on the ability to transfer lottery-won licenses in

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252 ITV Comments at 13; 218-219 MHz Licensees Comments at 12 and Reply Comments at 10 n.32; Bay Area at 4; Hughes Comments at 7 and Reply Comments at 7; In-Sync at 11; EON Reply Comments at 2; ISTA Reply Comments at 7-8.

253 In-Sync Comments at 11.

254 218-219 MHz Licensees Comments at 12; Bay Area Comments at 4.

255 Community Comments at 11 and Reply Comments at 4.

256 *Id.*

order to discourage the filing of speculative applications.[257] However, in 1997, Congress passed the Omnibus Budget Reconciliation Act which eliminated our authority to award licenses by lottery in this context.[258] Because there will be no future lotteries, relaxing the license transfer restriction rule in this instance will not have the result of creating an incentive to acquire licenses with the intention of quickly reselling them for a profit, and applicants will less likely enter into these proceedings for this purpose. License transfer restrictions are no longer essential vehicles to dissuade this practice. We also note that in recent services we generally have not utilized "anti-trafficking" rules.[259]

81. Furthermore, the problems that have plagued the 218-219 MHz Service warrant the removal of obstacles that would thwart the development of this service. Specifically, we recognize that nine of the largest markets were acquired by lottery and have experienced difficulty deploying service in this spectrum. Hence, concerns with the possibility of "trafficking" are now outweighed by our present concern to adopt rules that encourage the utilization of this spectrum. We believe that applying the license transfer restriction in this instance would have an adverse effect on the deployment of service and that relaxing the restriction would be in the public interest as this would place licenses in the possession of those licensees with

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257 *See 1992 Allocation Report and Order* at 1641; Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, 6222-6224 (1991).

258 *See* 47 U.S.C. § 309(i)(5) (1999).

259 *See, i.e., LMDS Second Report and Order*, 12 FCC Rcd 12545; *39 GHz Report and Order and Second NPRM*, 12 FCC Rcd 18600.

the incentive and the resources to develop the service in these markets. We, therefore, disagree with Community's assessment concerning the necessity of "anti-trafficking" rules for this service[260] and support the relaxation of this restriction where license transfers for lottery-won licenses will be individually examined to determine whether the license transfer is appropriate under our general public interest standards.

82. Other commenters suggest that we attach "conditions" on the elimination of the transfer restriction. For instance, ISTA states that we should eliminate the transfer restriction once the five-year construction benchmark is met.[261] Applying this option is impractical because we no longer require licensees to meet a five-year construction benchmark.[262] EON suggests that we create an initial window for license transfers that, upon expiration, requires buildout or meeting the service benchmark before a license transfer is allowed.[263] Although this is a potentially viable option because it creates a degree of flexibility for license transfers, we believe that a more liberal approach would best promote the utilization of the 218-219 MHz spectrum.

83. In this *Report and Order*, we are reassessing our current rules for the 218-219 MHz Service and removing potential barriers to maximize the development of viable services in this spectrum. As such, the relaxation of the license transfer restriction for the eighteen lottery-won licenses will

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260 CTI Reply Comments at 4.

261 ISTA Comments at 19.

262 *See Five-Year Benchmark Waiver Order*.

263 EON Comments at 1.

promote this objective. However, we note that we will evaluate all license transfer applications on a case-by-case basis pursuant to Section 1.948 of our rules to determine whether the license transfer would be in the public interest.[264]

## G. Spectrum Aggregation

84. *Background.* In establishing rules for the 218-219 MHz band, we concluded that the best way to promote competition in the developing marketplace would be to make at least two facilities available in each market.[265] Therefore, our cross-ownership rule prohibits an entity from holding or having an interest in the licenses for both frequency segment A (218.0-218.5 MHz) and frequency segment B (218.5-219 MHz) in the same service area.[266]

85. *Discussion.* Petitioners sought elimination of the cross-ownership rule, stating, *inter alia,* that competing services with larger bandwidth and greater capitalization provide the necessary competition to alleviate any concern that a 218-219 MHz Service licensee would exert monopoly power by aggregating one megahertz of spectrum, and that a full one megahertz of spectrum would enhance spectrum flexibility through expanded applications and services.[267] In 1996, the Commission denied a request for rulemaking on this issue.[268]

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264 *See* 47 C.F.R. § 1.948.

265 *Allocation Notice*, 6 FCC Rcd at 1371.

266 47 C.F.R. § 95.813(b)(1).

267 Letter Amendment at 4-5; *accord* MKS Petition at 5.

268 *Competitive Bidding Sixth MO&O/Further Notice*, 11 FCC Rcd at 19363.

In deciding not to grant the petition for rulemaking, we concluded that since the *interactive television marketplace* is in a relatively early state of competition," allowing a single entity to acquire both licenses in a service area would limit the opportunity for other potential competitors to emerge.[269] However, it is now clear that restricting the competitive analysis of the 218-219 MHz band to the interactive television service is inconsistent with failure of that service to develop in the marketplace and with the myriad services that are being proposed and that our rules now permit in the 218-219 MHz Service.[270] Therefore, it is now appropriate to reexamine the cross-ownership prohibition.

86. While most of the comments on this issue are in favor of permitting cross-ownership, EON and Community oppose permitting aggregation of those licenses. They argue that such an approach would create the possibility for a single licensee in a specific market, with a potential monopolistic effect on 218-219 MHz suppliers of equipment and applications.[271] This potential will then effectively create a disincentive for suppliers to invest in product development and place control of market entry in the hands of one entity.[272]

87. Ten parties take an opposing view and favor

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269 *Id.* (emphasis added).

270 *See 218-219 MHz Flex MO&O*, 13 FCC Rcd at 19075, ¶ 16, 19091, ¶ 49.

271 EON Comments at 1; Community Reply Comments at 9.

272 *Id.*

permitting the aggregation of 218-219 MHz service licenses.[273] In-Sync, ISTA, IVDS Enterprises Joint Venture (IVDS Enterprises), Interactive Innovations, Inc. (Interactive), Hispania & Associates, Inc. (Hispania), Eagle Interactive Partner, Inc. (Eagle), and the Coalition support permitting a licensee to hold both the "A" and "B" licenses in the same market. The primary reason cited by the parties for such a change is that a licensee with a 500 kHz bandwidth cannot be a serious competitor to operations in different bands that have larger available bandwidths. Dispatch also supports our proposal because licensees will face competition from other service providers which in turn will eliminate any anticompetitive concerns.[274] Concepts supports cross-ownership because the Commission has opened up various bands to competing services in the past and should do so in this case as well.[275] IVDS/RLV, L.L.C. and Friends of IVDS, Inc. (IVDS/RLV) also is in favor of cross-ownership between the A- and B-band licenses because it allows flexibility, thereby enhancing the interference elimination techniques.[276]

88. The evolution of services in the 218-219 MHz Service has made our cross-ownership restrictions a bar to investment in product development and creation of new services. Economies of scale and the types of service utilized in this band suggest that more bandwidth would be optimum

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[273] These commenters are the 218-219 Group, Bay Area, Dispatch, In-Sync, ISTA, IVDS Enterprises, Interactive, Hispania, Eagle, and Coalition.

[274] Dispatch Comments at 4.

[275] Concepts Comments at 5.

[276] IVDS/RLV Comments at 3.

for the development of 218-219 MHz operations. We agree with the majority of commenters that bandwidth greater than 500 kHz is necessary to compete effectively with operations in different bands offering similar services. Thus, we believe that permitting spectrum aggregation in the 218-219 MHz Service will promote, not inhibit, competition.

89. In the *218-219 MHz Flex NPRM*, we also sought comment on whether the 218-219 MHz Service spectrum should be included in any overall spectrum caps. While Hughes agrees with our proposal because aggregation may actually lead to development of new services and increased demand for products, it asserts that the 218-219 MHz Service spectrum should be included in any overall spectrum caps that are generally imposed on CMRS licenses.[277] The decisional factor in whether to apply a spectrum cap to a particular service is a balancing of the potential benefits and costs. We believe that the benefits normally associated with the spectrum cap are insufficient at this time to impose the spectrum cap on the 218-219 MHz Service.

90. The CMRS spectrum cap was imposed out of concern that "excessive aggregation [of spectrum] by any one of several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents."[278] It is intended to promote a vigorous competitive market for the provision of commercial mobile radio services, to ensure that each mobile service provider has the opportunity to obtain

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277 Hughes Comments at 7.

278 *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8101 (1994).

sufficient spectrum to compete effectively, and to ensure that no single provider is able to preclude the provision of service by effective competitors or significantly reduce the number of competitors by aggregating spectrum.[279]

91. It is possible that CMRS licensees may be the most efficient users of the 218-219 MHz spectrum because of their existing base station infrastructures. For example, it may be that a current CMRS licensee would be able to use its existing infrastructure to provide services in the most cost efficient manner. There may be other economies of scope in the provision of different services as well. Applying the CMRS spectrum cap to the 218-219 MHz spectrum would interfere with the realization of these savings by preventing the direct participation by those entities who own the existing CMRS infrastructure and, consequently, prevent customers from benefitting from these savings, with little off-setting benefit in competition.

## H. Partitioning and Disaggregation

92. In the *Partitioning Report and Order*, we expanded our rules to permit geographic partitioning and spectrum disaggregation for broadband PCS licensees.[280] Since the adoption of partitioning and disaggregation rules for broadband

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279 *See CMRS Third Report and Order* at 8108.

280 Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21831 (1996) (*Partitioning Report and Order*). Partitioning is the assignment of geographic portions of the license along geopolitical or other boundaries. Disaggregation is the assignment of discrete portions or blocks of spectrum licensed to a geographic licensee or qualifying entity. *Id.* at 21833, n.2.

PCS, we have adopted and proposed adopting partitioning and disaggregation for a number of services.[281] Consistent with the broadband PCS rules, we proposed to permit partitioning and disaggregation for the 218-219 MHz Service.

93. We now conclude that a flexible approach to partitioned areas, similar to the approach we adopted for broadband PCS, is appropriate for the 218-219 MHz Service. We will therefore permit partitioning of 218-219 MHz Service licenses based on any area defined by the parties within the licensee's service area.[282] We conclude that combined partitioning and disaggregation should also be permitted for the 218-219 MHz Service. This approach would afford parties optimal flexibility to respond to market forces and demands for service relevant to their particular locations and service offerings. We authorize a partitionee and disaggregatee to hold its license for the remainder of the original licensee's term. We believe that this approach would prevent licensees from using partitioning and disaggregation to circumvent our established

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[281] *See, e.g.*, Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Fourth Report and Order*, 12 FCC Rcd 13453 (1997); Rule Making to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, *Fourth Report and Order*, 13 FCC Rcd 11655 (1998).

[282] In the *218-219 MHz Flex NPRM*, we proposed partitioning rules which permitted licensees to utilize FCC-recognized service areas when defining a partitioned service area, and defined "FCC-recognized service areas" to include Major Trading Areas (MTAs) and Basic Trading Areas (BTAs). Rand McNally, copyright owner of the MTA and BTA classifications, asserts that the Commission must not use the MTA/BTA classifications for partitioning within the 218-219 MHz Service without first negotiating a specific licensing agreement. Rand McNally Comments at 2.

license term rules. Additionally, by limiting the license term of the partitionee or disaggregatee, we ensure that there will be maximum incentive for parties to pursue available spectrum as quickly as practicable, thus expediting the delivery of service to the public.

94. In the *Partitioning Report and Order*, we concluded that allowing partitioning and disaggregation would help to (a) remove potential barriers to entry, thereby increasing competition; (b) encourage parties to use spectrum more efficiently; and (c) speed service to unserved and underserved areas.[283] Similarly, we believe that such an approach for the 218-219 MHz Service would result in the same public interest benefits. Providing licensees with the flexibility to partition potentially creates smaller service areas that could be licensed to small businesses, including those entities that previously may not have had the resources to participate successfully in spectrum auctions. With regard to the copyright concerns Rand McNally has raised, we will revise our final rules to remove the reference to MTAs or BTAs as potential geographic areas to be used for partitioning in the 218-219 MHz service. Rather, we will provide a specific reference to the United States Department of Commerce Bureau of Economic Analysis Economic Areas and EA-like areas which the Commission has defined in other contexts.[284] We believe that this approach resolves the copyright concerns raised by Rand McNally.[285] We further note that our substitution of EA-like areas for MTAs and BTAs does not limit the ability of licensees to partition a license to their desired degree of specificity

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283 *Partitioning Report and Order*, 11 FCC Rcd at 21843.

284 *See, e.g.*, 47 C.F.R. § 90.823.

285 *See* Rand McNally comments at 2.

(including by the submission of exact coordinates, if they choose), but is designed solely to address the copyright concerns raised by Rand McNally.

## I. Technical Standards

95. *Background.* Having concluded that we will be able to meet our goal of providing licensees the flexibility to design their service offerings in response to market demand, we now turn to the specific technical restrictions associated with the service. In the *218-219 MHz Flex NPRM*, we invited comment on our technical rules, including those rules requiring automatic power control capability,[286] antenna height and transmitter power limitations,[287] duty cycle limitations,[288] and other interference protection standards. We also asked whether the interference provisions of Section 95.861 of our rules,[289] which require 218-219 MHz Service licensees to resolve problems with interference to television broadcast reception or discontinue operation, are sufficient to protect broadcast

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[286] 47 C.F.R. § 95.855(a). Automatic power control capability, included in the RTU circuitry, automatically adjusts the RTU power output to the minimum amount necessary for communication between the CTS and the RTU. This capability minimizes the possibility of an RTU causing interference to a television broadcast receiver. We implemented the automatic power control requirement for all RTUs in the *1992 Allocation Report and Order*, 7 FCC Rcd at 1635, 1648.

[287] 47 C.F.R. §§ 95.855, 95.859.

[288] 47 C.F.R. § 95.863. A transmitter "duty cycle" is a limit to the amount of time a transmitter can transmit during a specific time frame, which, in the 218-219 MHz Service as initially allocated, minimizes the potential for interference to reception of TV Channel 13.

[289] 47 C.F.R. § 95.861.

spectrum.[290]

96. We established the technical restrictions on the 218-219 MHz Service in the *1992 Allocation Report and Order*. TV Answer and the Association for Maximum Service Television had previously reached an agreement whereby then-IVDS licensees and TV Channel 13 operations could co-exist.[291] Both this agreement and our interference restrictions were based on TV Answer's system design.[292] However, the potential applications for the 218-219 MHz Service go far beyond the service envisioned by TV Answer when these rules were designed. Concurrent with the expansion of potential applications for the service, we have received various requests for waiver of these technical standards,[293] as well as petitions that we relax or eliminate certain technical rules.[294]

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[290] *218-219 MHz Flex NPRM*, 13 FCC Rcd 19092. The applicable rule is at 47 C.F.R § 95.861.

[291] *1992 Allocation Report and Order*, 7 FCC Rcd at 1632.

[292] *Id.*, 7 FCC Rcd at 1633.

[293] *See* Jay M. Lieberman and Michael R. Walton, dba J & M Partnership Request for Waiver (July 14, 1997) (seeking waiver of the antenna height and power ratios, 47 C.F.R. § 95.859(a)); Ronald E. Dowdy Request for Waiver (July 9, 1997) (seeking the same); Raveesh K. Kumra Request for Waiver (Apr. 17, 1997) (seeking waiver of the antenna height and power ratios, 47 C.F.R. § 95.859(a), and the duty cycle limitations, 47 C.F.R. § 95.863(a)). These waiver requests were incorporated into the record of this proceeding by the *218-219 MHz Flex NPRM*. *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19094, n.201.

[294] These requests include petitions seeking waiver of automatic power control in RTUs with power in excess of 100 milliwatts, 47 C.F.R. § 95.855(a). *See* Third Letter Amendment (attachment at 2). *Cf.* Phoenix Data Communication, Inc., Request for Waiver of Section 95.855 of the

97. *Discussion.* Commenters overwhelmingly claim that our current rules no longer serve the 218-219 MHz Service, and that by retaining the rules, we will significantly hinder the flexibility we are seeking to provide licensees of the service.[295] As EON notes, the spectrum is being used for purposes other than those for which the original restrictions were created.[296] In their discussion of specific technical rules, commenters claim that the current restrictions discourage manufacturers from developing equipment for the service.[297] Many commenters also claim that 218-219 MHz Service licensees would be able to better develop services if greater parity existed between services.[298] In addition, Concepts also

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Commission's Rules, *Order*, 13 FCC Rcd 25195 (WTB, 1998) (*Phoenix Waiver*) (discussing waiver of the RTU automatic power control requirement, filed in conjunction with an application for type acceptance of its proposed equipment); Requests for Waiver of Section 95.859(a)(2), Concerning Interactive Video and Data Service (IVDS) Transmitter Power Limits, *Order*, 11 FCC Rcd 4669 (WTB 1996) (*1996 Waiver Order*) (discussing waiver of 47 C.F.R. § 95.859(a)(2) to permit use of specific CTS technology programmed to transmit only during the TV Channel 13 horizontal blanking interval).

295 *See, e.g.*, ITV Comments at 14.

296 EON Reply Comments at 2; *See also* Petty Comments at 1 (noting that most services now contemplated for the 218-219 MHz Service involve applications not associated with television); 218-219 Group Comments at 15 and In-Sync Comments at 14 (noting that because it is unlikely that set-top boxes that could interfere with TV Channel 13 reception due to their proximity to television sets will be used – as proposed in TV Answer's service model – our power control rule will be unnecessary in many cases).

297 *See, e.g.*, Phoenix Reply Comments at 2; Boston/Houston Comments at 10; 218-219 Group Comments at 15 (discussing automatic power control); ISTA Comments at 14; IVDS Enterprises Comments at 1.

298 ISTA Comments at 18; 218-219 Group Comments at 18.

claims that the current technical rules contain several inconsistencies.[299]

98. There is broad agreement that the current technical rules can be relaxed without increasing the possibility of interference. ISTA notes that by separating the 218-219 MHz Service transmitter and the television receiver, potential interference can be eliminated, and IVDS cited tests by Young Design and Berkeley Varitronic Systems, Inc., that concluded that the interference potential is virtually eliminated if the transmitter is separated from television sets by a distance of fifty feet or more.[300] Several commenters also agree with our tentative conclusions that the evolution toward precise digital technology, both within the evolving 218-219 MHz Service industry,[301] and on the part of the broadcast industry,[302] will further reduce interference potential.[303] ISTA, for example, suggests that the evolution toward digital will enable all

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299 Concepts Comments at 3-4.

300 ISTA Comments at 5-6; IVDS Enterprises Comments at 1.

301 For example, current licensees of 218-219 MHz Service systems have indicated in presentations to Bureau staff that the marketable uses of systems in the band appear to use digital emission types of equipment, utilizing much lower transmitter power than is presently authorized, and that digital emissions produce imperceptible (or no) interference to TV Channel 13 when the RTU transmitting antenna is at least three feet away from the TV receiver.

302 *See generally, e.g.*, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809 (1997).

303 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19094-95. *See also id*, 13 FCC Rcd at 19078 (denying petitions to expand the area of RTU duty cycle limits); *Mobility Report and Order*, 11 FCC Rcd at 6611.

spectrum technologies to monitor and control their respective spectrums and suppress interference.[304] Finally, commenters note that we allow other services to operate in frequencies adjacent to the television spectrum without the same types of technical restrictions we impose on 218-219 MHz Service operations and that, because these other adjacent-band services are able to operate without causing interference, the technical restrictions on the 218-219 MHz Service are not justified.[305] Several commenters contrast the minimal technical restrictions for the Automated Maritime Telecommunications Systems (AMTS) – which operates in the band immediately adjacent to TV Channel 13 – with the more stringent technical restrictions for the 218-219 MHz Service, which is separated from Channel 13 by 2 MHz.[306] Other commenters point to similar situations in the amateur services and Private Land Mobile Radio Services in the 220-222 MHz band.[307]

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304 ISTA Comments at 20. *See also* 218-219 Group Comments at 17; Hughes Comments at 9.

305 *See, e.g.*, Hughes Comments at 9; CRSPI Comments at 3-4; IVDS/RLV Comments at 3; In-Sync Comments at 14; Boston/Houston Comments at 8-9. *See also 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19093-94 (noting that other services are authorized to transmit in frequencies adjacent to or nearby 218-219 MHz with higher power levels than allowed at 218-219 MHz and with no duty cycle restrictions).

306 Community Reply Comments at 5, Hughes Comments at 9. AMTS is authorized for 80 channels from 216.0125 MHz to 229.9875 MHz. 47 C.F.R § 80.385. Several commenters make an additional argument that the 2 MHz "guard" band between TV Channel 13 and the 218-219 MHz Service provides interference protection that makes our technical rules unnecessary. Boston/Houston Comments at 10 and CRSPI Comments at 5-6.

307 Hughes Comments at 9, IVDS Enterprises Comments at 2.

99. We conclude that, in general, our specific technical rules are designed for a service model that bears little similarity to the breadth of services envisioned for the 218-219 MHz Service, and that these rules provide a measure of interference protection that may not be necessary in all cases.[308] However, we also believe that we should retain any technical rule that still provides needed interference protection to TV Channel 13 regardless of the specific service being employed by a 218-219 MHz Service licensee. We briefly re-examine each technical rule, and retain those that are still broadly applicable to the 218-219 MHz Service.

### 1. Duty Cycle Limitations

100. *Background.* Section 95.863 or our rules[309] imposes a maximum duty cycle of five seconds per hour for each RTU, whether fixed or mobile. In the *218-219 MHz Flex NPRM*, we noted that the duty cycle limitation – which applies only to those RTUs operating within the TV Channel 13 predicted Grade B contour – was not designed as "one of the principal ways we intended to minimize the interference potential of the 218-219 MHz Service," but was instead

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[308] Although MKS suggests that, even with a total relaxation of the rules, many licensees may still consider the 218-219 MHz Service a "non-starter," this restriction cannot serve as a basis for the FCC to fail to maintain technical rules that are necessary to provide adequate interference protection. MKS Comments, ¶ 9. *See also* EON Reply Comments at 2 (suggesting that anything short of completely lifting the technical standards would appease only a minority of the commenters and be detrimental to the industry's future).

[309] 47 C.F.R. § 95.863.

designed as "an additional safeguard against interference."[310]

101. *Discussion.* Commenters suggest that new uses of the 218-219 MHz Service in conjunction with "substantial improvements in television receiver technology," make the rule unnecessary.[311] Concepts says that allowing the transmitter to only transmit during the blanking intervals will produce signals that are neither visible nor audible to the viewer without the use of the prescribed duty cycles,[312] and other commenters who suggest that we retain a duty cycle limitation in some form see little need for duty cycles for mobile units or those RTUs that operate far away from the television set-top.[313] We conclude that because licensees may design their system to operate in a cycle that will not cause television interference, or they may operate equipment that is sufficiently removed from television receivers to prevent interference, the duty cycle rule no longer has broad applicability and we eliminate it.

### 2. 100 Milliwatt Power Limitation on Mobile RTUs

102. *Background.* In authorizing mobile RTU operations in the *Mobility Report and Order*, we established a

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310 *218-219 MHz Flex MO&O*, 13 FCC Rcd at 19077 (citing *Mobility Report and Order*, 11 FCC Rcd at 6618-19).

311 IVDS Enterprises Comments at 1-2.

312 Concepts Comments at 2. Several commenters discussed the use of systems designed to transmit only during the vertical blanking interval of the television wavecast. For example, RTT suggests that such a system would substantially increase data transmission throughput versus the current duty cycle limitation. RTT Comments at 6.

313 Community Comments at 17; Community Reply Comments at 5; Dispatch Comments at 6.

100 milliwatt mean power limit for mobile RTUs.[314] We concluded that it was appropriate to establish a lower limit than the twenty watts allowed for fixed RTUs and CTSs, because allowing unrestricted mobile operations increases the interference potential with respect to the operations of licensees of other services.[315]

103. *Discussion.* There is support for relaxing the 100 milliwatt limit. For example, Dispatch – whose parent company also owns and operates a Channel 13 TV station – contends that the 100 milliwatt limit can be increased without causing interference to Channel 13 operations.[316] Community, citing a study conducted by the Technology Applications Center of Norfolk and the Engineering Department of Old Dominion University (TAC/ODU) that found no significant interference by one-watt mobile RTUs operating with no duty cycle outside a residence in the Grade B contour of Channel 13, suggests that mobile RTUs should be allowed to operate anywhere outside a residence at one watt, and that we should grant waivers to allow operation at higher powers upon a technical showing of no interference.[317] Commenters suggest other limits, including four watts, based on the experiences with low-band FM and TV Channel 6;[318] twenty-five watts and an ERP not exceeding eighteen watts, based on our AMTS

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314 *Mobility Report and Order*, 11 FCC Rcd at 6617.

315 *Id.*

316 Dispatch Comments at 6. Dispatch's parent company owns WTHR(TV) Channel 13 in Indianapolis. Dispatch Comments at 1, n.1.

317 Community Comments at 17.

318 CRSPI Comments at 5. *See also* ISTA Comments at 7 (finding a 4 watt limit "justified").

rules;[319] and an average power limit at 100 milliwatt or the peak power at twenty watts, whichever is lower.[320] Based on the comments, we conclude that a power limit for mobile RTU operation is still justified to protect against TV Channel 13 interference, but that the studies show that we can relax the 100 milliwatt limitation. We will set the maximum average mobile RTU power at four watts. Although Community's study was based on comprehensive interference predictions but actual tests at one watt, we conclude that a four-watt limit is desirable, given the absolute interference protection provisions and our desire to allow maximum flexibility in the 218-219 MHz Service. However, because mobile RTU use has the potential to cause sporadic interference that may be difficult to trace and resolve – for example, when an RTU-equipped vehicle drives by a household with a TV Channel 13 receiver[321] – we find the four-watt mobile RTU limit as suggested by commenters to be justified, and within the range of power limits the Commission has established for services operating in or in close proximity of the 218-219 MHz band. We emphasize that, in no case, may a 218-219 MHz Service licensee cause interference to TV Channel 13 reception (see § 95.861, 47 C.F.R. § 95.861), and we expect that technical limitations will require licensees, in some applications, to use RTUs that use a lower power than authorized by our rules.

### 3. Automatic Power Control

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319 Community Reply Comments at 5 (citing 47 C.F.R. § 80.215(i)).

320 RTT Comments at 6.

321 *See* Community Comments at App. A (suggesting that the fact that a vehicle-mounted RTU that causes interference will quickly move away as a basis for concluding that the potential for interference is limited).

104. *Background.* Section 95.855(a) of our rules requires the use of automatic power control for any RTU with power in excess of 100 milliwatts in order to ensure that the RTU uses the minimum effective radiated power necessary for successful communications.[322] As part of our *218-219 MHz Flex Order and NPRM*, and in response to waiver requests pertaining to automatic power control, we re-evaluated whether this rule, designed to mitigate potential interference, is still justified.

105. *Discussion.* Many commenters note that we have previously granted waivers of the automatic power control restrictions.[323] For example, we waived the RTU automatic power control requirement in conjunction with an application for type acceptance of equipment proposed by Phoenix Data Communications, Inc.[324] In its petition, Phoenix sought a waiver for a transmitter that was part of a microprocessor-controlled street light photocontroller that uses the 218-219 MHz Service radio frequencies to report the status of a street light to a base radio receiver system.[325] We found that the configuration of the 218-219 MHz system as described by Phoenix differed to such an extent from the systems for which the service was originally designed that there was no possibility that the Phoenix equipment would be in close proximity to television receivers such that there was an increased potential

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322 47 C.F.R. § 95.855.

323 *See, e.g.*, 218-219 Group Comments at 15.

324 *Phoenix Waiver*, 13 FCC Rcd 25195.

325 Phoenix Data Communication, Inc., Request for of Section 95.855 of the Commission's Rules, at 3.

for interference to TV Channel 13 reception.[326] Based on our findings in the Phoenix Waiver, we cannot agree with Dispatch that the automatic power control represents a minimal intrusion on system design.[327] Rather, we conclude that it represents an example of an unnecessary regulatory impediment to the development of applications for the 218-219 MHz Service. We conclude that the automatic power control restriction will not be applicable to all services envisioned in the 218-219 MHz Service, and we eliminate it. As discussed further in Section IV.I.6, *infra*, 218-219 MHz Service licensees remain under the continuing obligation to resolve any interference problems with television broadcast reception or discontinue operations.

### 4. CTS Antenna Height and Transmitter Power Ratios

106. *Background.* Section 98.859(a) of our Rules sets maximum power limits for CTSs, based on the height of the CTS antenna. The taller the CTS antenna, the less powerful the maximum ERP we permit for the CTS.

107. *Discussion.* The 218-219 MHz Group suggested that we could either allow operations at up to 250 watts ERP as long as the power of the signal remains substantially lower than the Channel 13 signal or, alternately, that we could adopt a standard "colocation exemption" within one-quarter of one mile of a Channel 13 broadcaster.[328] RTT suggests that we allow full-power CTS transmissions in the TV Channel 13 blanking interval as an alternative to the existing height and power

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326 *Phoenix Waiver*, ¶ 6.

327 Dispatch Comments at 7.

328 218-219 Group Comments at 17.

limitation ratios,[329] and Concepts supports full-power operations at 500 feet height above average terrain in all cases if signals are only transmitted during the blanking intervals of TV Channel 13.[330] We have previously waived Section 98.859(a)(2) of our Rules for a 218-219 MHz Service system employing vertical blanking technology, after finding that the "new and innovative technology" being used was unlikely to cause interference.[331] Given the variety of mechanisms licensees have proffered for the elimination of possible interference, we conclude that the current height-power ratios are no longer broadly applicable, and we remove them. We will retain the general restriction in Section 95.859(a) of our Rules that no CTS antenna shall be elevated higher than necessary to assure adequate service.

### 5. Limits on Transmitter Effective Radiated Power

108. *Background.* In the *Mobility Report and Order* we considered – but rejected – any modifications to the 20-watt maximum power for fixed RTUs after concluding that no party had offered any evidence to show that our choice of a twenty-watt limit for fixed service was ill-advised.[332] Under the provisions in Section 95.855(b) of our Rules, a CTS is required to operate between a one- and twenty-watt ERP, based on its CTS location within a TV Channel 13 service area. We re-examine our maximum twenty-watt rule today.

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329 RTT Comments at 6.

330 Concepts Comments at 6.

331 *1996 Waiver Order*, 11 FCC Rcd at 4670.

332 *Mobility Report and Order*, 13 FCC Rcd at 6617.

109. *Discussion.* Concepts suggests that the power limitations should be modified to allow for full twenty-watt ERP in all cases if signals are only transmitted during the blanking interval of TV Channel 13.[333] Several other commenters suggest the elimination of this rule on the basis that higher power limits would allow licensees to use new modulation techniques which would reduce the cost of building systems.[334] Although we want to promote flexibility in the provision of 218-219 MHz Services, we do not believe that a reduction in build-out costs, by itself, can serve as a basis for eliminating the rule. Based on Concept's comments, however, we are convinced that licensees may be able to develop systems that account for the additional potential for interference in the Grade B area that prompted our reduced maximum CTS ERP in Section 95.855(b) of our rules, and we establish a maximum CTS ERP of twenty watts in all cases. This additional flexibility should foster the development of new services in the 218-219 MHz Service.

110. Nevertheless, we conclude that we should retain a twenty-watt maximum ERP because the establishment of a maximum permissible power limit provides an important measure of interference protection and no commenter (except those advocating the complete removal of the technical rules) offered evidence that our specification of a maximum power level for the 218-219 MHz Service is ill-advised. The twenty-watt limit is appropriate because the 218-219 MHz Service is allocated such that there will be other 218-219 MHz Service operations in adjacent MSAs and RSAs to which a 218-219 Mhz Service licensee must provide interference protection.

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333 Concepts Comments at 6.

334 ISTA Comments at 5 (promoting the use of QAM-64 Modulation); IVDS Enterprises Comments at 2 (suggesting a 25 watt power limit).

Moreover, unlike automated marine telecommunications system (AMTS) services (in which subsequently authorized TV services do not enjoy interference protection), 218-219 MHz Service licensees have an absolute duty to provide interference protection to TV Channel 13 reception, regardless of when the TV service was authorized. As a general matter, we do not believe that 218-219 MHz Service licensees will propose operations in excess of twenty watts, nor will they be able to afford adequate interference protection for operations greater than twenty watts. In this connection, we note that the pending waiver requests of Jay M. Liberman and Michael R. Walton, dba J&M Partnership, Ronald E. Dowdy, and Raveesh K. Kumra, all involve proposed operations at twenty watts. In the unusual circumstance in which a 218-219 MHz Service provider structures a system that can operate in excess of twenty watts and provide necessary interference protection, we believe that a request for a waiver would be the most appropriate course.

### 6. General Interference Protection

111. *Background.* We also asked whether the general interference protection afforded by Section 95.861 of our Rules[335] is sufficient to protect broadcast reception.[336] Section 95.861 of our Rules requires, *inter alia*, that 218-219 MHz Service licensees either resolve interference problems to television broadcast reception or discontinue operations.[337]

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335 47 C.F.R. § 95.861.

336 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19094-95.

337 Portions of the interference rule requiring a 218-219 MHz Service licensee operating within a TV Channel 13 station Grade B predicted contour to notify households of the potential for interference are subject to

Commenters were divided on whether we should rely on Section 95.861 of our Rules as the sole means of interference protection. Eagle asserts that we should completely remove the technical and operational rules, and instead retain Section 95.861 of our Rules to resolve interference problems to broadcast operations,[338] and In-Sync claims that Section 95.861(e) of our Rules – which requires 218-219 MHz Service licensees to investigate and resolve interference upon written complaint by either a television viewer or broadcast station – provides adequate interference protection by itself.[339] However, other commenters state that the complete removal of technical and operational limitations will result in interference, and thus Section 95.861 of our Rules, on its own, provides inadequate protection.[340]

112. *Discussion.* As an initial matter, we agree with commenters that Section 95.861(e) should be the foundation for resolving interference complaints between 218-219 MHz Service licensees and television stations and viewers.[341] Given the nature of the 218-219 MHz Service, this section provides

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petitions on file with the Commission. *See* Third Letter Amendment (attachment 2-3) (seeking clarification that the notification requirements of Section 95.861(c) would not apply to licensees providing one-way emergency transmission to receive-only CTSs); *accord* MKS Petition at 5 (requesting elimination of the notification procedures).

338 Eagle Reply Comments at 2.

339 In-Sync Comments at 14.

340 *See, e.g.*, Hispania Reply Comments at 2.

341 218-219 Group Reply Comments at 7. *See also* ISTA Comments at 14 (also suggesting modifications to the language of this subsection). We also note that § 95.861(a) provides a mechanism for the resolution of interference problems among 218-219 MHz Service licensees.

the most suitable mechanism for resolving interference complaints. The alternative – primary reliance on more specific technical rules – would either undermine this service's flexibility (which we have determined is critical to its success), or lead to frequent waiver requests by those proposing new and innovating uses of the spectrum (an impractical result that would turn the waiver process on its head).[342] Primary reliance on Section 95.861(e) will not, of course, eliminate in advance all potential interference concerns between 218-219 MHz systems and TV Channel 13 reception,[343] but this approach toward interference management will avoid imposing restrictions that may be overprotective or unnecessary in many cases. Concepts, Hispania, and Interactive all state that licensees will most likely have to make trade-offs between specific technical considerations – such as power, antenna height, duty cycle, timing with respect to Channel 13 vertical blanking intervals, distance to an over-the-air TV receiver, and automatic power controls – in order to provide adequate interference protection, and we agree this may the be the case for certain 218-219 MHz Service systems.[344] Such tradeoffs go

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342 We previously relied on this approach when the 218-219 MHz Service was designed for a specific application. *See 1992 Allocation Order*, 7 FCC Rcd 1634, ¶ 31 (stating that we would accept requests for waivers of our antenna height limit on a case-by-case basis). *C.f. 1996 Waiver Order*, 11 FCC Rcd at 4670, ¶ 6.

343 For example, some licensees may choose to develop service based on the model originally envisioned in the *1992 Allocation Order*, and may use a set-top RTU that has the potential for Channel 13 interference. *See also, e.g.*, Community reply comments at 6 (concluding that automatic power control should be retained for certain fixed RTUs and for mobile units); RTT Comments at 7 (suggesting that automatic power control may still be necessary for mobile applications utilizing greater power).

344 Hispania Reply Comments at 1-2; Interactive Reply Comments at 2; Concepts Supplemental Filing at 5 (noting that the current technical

hand-in-hand with the flexibility we are providing, but we must leave it to the 218-219 MHz Service licensee to determine what tradeoffs will be necessary for a particular system to avoid Section 95.851's ultimate resolution of an interference problem that cannot be corrected by the system – discontinuance of 218-219 MHz Service operations.[345]

113. Concepts notes that after-the-fact resolutions are more expensive than prior planning to avoid interference,[346] and we agree that 218-219 MHz Service licensees who rely solely on the interference correction provisions of Section 95.861(e) of our Rules could cause interference with TV Channel 13 reception that might not be resolved for as long as thirty days. Accordingly, we find merit in Concept's suggestion that licensees should, as part of their planning process, produce an interference control plan detailing the technical parameters and operational information being used to mitigate any identified

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standards rules are "overprotective if applied simultaneously").

345 Because of the flexibility of services a 218-219 MHz Service licensee may provide, we will not adopt the additional technical rule modifications suggested by commenters in order to allow a licensee to determine what technical tradeoffs are necessary for a particular system. *See, e.g.*, ISTA Comments at 9 (suggesting that a definition of "other than fixed" for mobile RTUs, would allow us to restrict "other than fixed" RTUs to commercial, industrial, or vehicular applications that cannot be used around a household and thus wouldn't cause potential Channel 13 interference); Concepts Comments at 2 and 5 (asking us to specify "a residential dwelling which uses direct reception of TV Channel 13 signals," in order to limit requests to mitigate TV interference to only those viewers using direct reception of TV signals); Dispatch Comments at 6-7 (calling for additional considerations with respect to fixed facilities).

346 Concepts Reply Comments at 1-2.

interference effects.[347] We will therefore retain and expand the requirement in Section 95.815 (d)(3) of our Rules that licensees prepare and submit an interference plan.[348] We clarify that the plan must provide an analysis of a licensee's proposed system and describe the methods being used to eliminate co- and adjacent channel interference. Moreover, the 218-219 MHz Service licensee must update the plan to reflect changes to its system design or construction.

114. More extensive use of the pre-planning requirement can largely replace Section 95.861(c) of our Rules, which requires 218-219 MHz Service licensees to provide notification to households within a TV Channel 13 station Grade B predicted contour of the potential for interference, unless a licensee obtains written consent from the TV Channel 13 station licensee to dispense with the notification. Because we expect 218-219 MHz Service licensees to utilize pre-planning to identify and mitigate any potential interference, the household notification rule is needlessly burdensome. We retain both the requirement in Section 95.861(d) of our Rules that each 218-219 MHz Service licensee must, upon request, install free of charge an interference reduction device to any household that experiences interference, and the absolute interference protection provision of Section 95.861(e) of our Rules. We will also require that the 218-219 MHz Service licensee provide a copy of the interference control plan (and all subsequent modifications) to all TV Channel 13 station licensees whose predicted Grade B contour overlaps with the 218-219 MHz Service licensee's service area.

115. Finally, we recognize that many television viewers

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347 Concepts Reply Comments at 2.

348 47 C.F.R. § 95.815 (d)(3).

will not know that any incremental interference can be eliminated under the rules.[349] However, both the initial design for the 218-219 MHz Service and comments received in this proceeding lead to the conclusion that a particularly strong interference potential exists when 218-219 MHz Service equipment is placed near television receivers. In those cases, it is reasonable to conclude that the 218-219 MHz Service use and the TV Channel 13 viewing will occur in the same household. In the *1992 Allocation Order*, we noted that a 218-219 MHz Service subscriber might experience some interference to its television reception when operating an RTU, but we did not impose additional notification provisions.[350] Instead, we noted that "it might behoove the [218-219 MHz Service] licensee to install an interference reduction device on the television receivers of its subscribers," and concluded that "[i]t will be at the subscriber's discretion as to whether sporadic interference to his own household television reception that might be caused by RTU operation is unacceptable."[351] This analysis is still valid, and we conclude that 218-219 MHz Service licensees who design systems that include RTUs designed for household use will choose to account for any potential interference in order to ensure consumer acceptance of their equipment.

### J. Incorporation by Reference of Part 1 Standardized Auction Rules

116. *Background.* In the *Part 1 Third Report and Order*, we amended our uniform set of competitive bidding

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349 Dispatch Comments at 7-8.

350 *1992 Allocation Order*, 7 FCC Rcd at 1637, ¶ 49.

351 *Id.*

rules for all auctionable services, which applied generally to the 218-219 MHz Service, incorporating our experience to date and allowing us to conduct future auctions in a more consistent, efficient, and effective manner.[352] These amended procedures, set forth in Part 1, Subpart Q of the Commission's rules, supersede previously adopted service-specific rules, unless the Commission determines that with regard to particular matters, the retention or adoption of service-specific rules is warranted.[353]

117. In the *218-219 MHz Flex NPRM*, we proposed to conduct all future auctions for licenses in the 218-219 MHz Service in conformity with the amended general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules. Specifically, we proposed to employ the Part 1 rules governing designated entities, application issues, payment issues, competitive bidding design, procedure and timing issues, and anti-collusion.[354] In this regard, consistent with our decision in the *Part 1 Third Report and Order*, we would no longer offer installment payments as a means of financing small business participation in the 218-219 MHz Service auction. Instead, we proposed to retain the two tiers of small business size standards currently set for 218-219 MHz Service licensees, and utilize the standard schedule of bidding credits set forth in the *Part 1 Third Report and Order* as applied to those two tiers of small businesses, which would allow for somewhat higher bidding credits in light of the suspension of installment

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352 *Part 1 Third Report and Order*, 13 FCC Rcd at 374.

353 *See id.*, 13 FCC Rcd at 382.

354 *See 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19095-96.

payment financing.[355] We sought comment on these proposals and on whether any of our Part 1 rules would be inappropriate in an auction for this service.

118. *Discussion.* Commenters support applying the Part 1 rules to the 218-219 MHz Service.[356] We believe that application of these rules will allow 218-219 MHz Service auction participants to realize the benefits enjoyed by participants in other spectrum auctions of a streamlined, efficient licensing process. Therefore, we will adopt our proposal to follow the competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules, to conduct all future auctions for licenses in the 218-219 MHz Service. Specifically, we conclude that the Part 1 rules will govern competitive bidding issues in the 218-219 MHz Service, including issues concerning designated entities, application issues, payment issues, competitive bidding design, procedure and timing issues, and anti-collusion.[357]

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355 *Compare Part 1 Third Report and Order*, 13 FCC Rcd at 404 (establishing standard bidding credits of 35 percent for businesses with average gross revenues not exceeding $3 million for the preceding three years, and 25 percent for businesses with average gross revenues not exceeding $15 million for the preceding three years) *with* 47 C.F.R. § 95.816(d)(1) (service-specific bidding credits of 15 percent for businesses with average gross revenues not exceeding $3 million for the preceding three years, and 10 percent for businesses with average gross revenues not exceeding $15 million for the preceding three years).

356 *See* Hughes Comments at 10; In-Sync Comments at 15; Community Teleplay Comments at 15; ITV Comments at 17; IVDS Affiliates at 17.

357 *See, e.g.*, 47 C.F.R. §§ 1.2110 (designated entities), 1.2105 (bidding application and collusion), 1.2106 (upfront payments), 1.2103 (competitive bidding design), 1.2104 (competitive bidding mechanisms).

119. Accordingly, installment payments will no longer be offered as a means of financing small business winners of licenses in the 218-219 MHz Service auction. We will continue to employ small business size standards and bidding credits to promote designated entity participation in the 218-219 MHz Service.[358] Two commenters support the Commission's application of the small business size standards currently specified for the 218-219 MHz Service,[359] while two other commenters believe that the gross revenue thresholds for determining what constitutes a small business and a very small business should be increased.[360]

120. We believe the current 218-219 MHz Service small business size standards are appropriate for this service. In addition, we have not undertaken any action that would change these capital requirements. Therefore, consistent with our proposals, we will retain the two tiers of small business size standards currently specified for 218-219 MHz Service licensees and will utilize the standard schedule of bidding

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358 *See* revised 47 C.F.R. § 95.816(c), listed herein under Appendix B. *See also* 47 C.F.R. § 1.2110(e).

359 Community asserts that the 218-219 MHz Service is a service for small businesses, and therefore, the small business definitions should remain at their low levels to prevent businesses considered too small in a broadband service from taking advantage of bidding credits. Community Comments at 21. In-Sync believes such credits will allow it to devote more capital to market development, thereby expediting service to the public. In-Sync Comments at 16.

360 *See* ITV Comments at 17-18. ITV maintains that, because of the lack of operating experience in the industry, 218-219 MHz Service licensees will not have access to bank debt or other sources of lending, and therefore, suggests that the thresholds for "very small business" and "small business" be raised to $5 and $18 million dollars, respectively.

credits set forth in the *Part 1 Third Report and Order* as applied to those two tiers of small businesses. Accordingly, we will define a small business as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years.

121. In-Sync contends that all existing licensees and their affiliates should receive a 15 percent bidding credit on future auctions in light of the controversial history of the IVDS service.[361] In-Sync reasons that any pool of future bidders in the 218-219 MHz Service would be limited to existing licensees and CMRS providers seeking to aggregate spectrum. In-Sync asserts that, since 218-219 MHz Service licensees will be undercapitalized, they will be unable to compete effectively with CMRS aggregators, thereby meriting the extra bidding credit.[362] We do not agree. We believe that our auction and service rules will provide existing licensees with a reasonable opportunity to compete against CMRS aggregators. Accordingly, we will adopt tiered bidding credits for these small business definitions, consistent with levels adopted in the Part 1 proceeding. Small businesses will receive a twenty-five percent bidding credit. Very small businesses will receive a thirty-five percent bidding credit. Bidding credits for small businesses are not cumulative. As noted in the Part 1 proceeding, we believe that this approach will provide adequate opportunities for small businesses of varying sizes to

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361 In-Sync Comments at 15.

362 In-Sync Comments at 15-16.

participate in spectrum auctions.[363] We believe that the tiered bidding credits we adopt for the 218-219 MHz Service are reasonable in light of our decision not to use installment payments and expect that they will enable small businesses to compete for spectrum licenses through our auction program.

## V. MEMORANDUM OPINION AND ORDER

122. *Introduction.* We have before us a petition for reconsideration of the *Tenth Report and Order*[364] filed by Interactive America Corporation ("IAC").[365] For the reasons discussed below, we dismiss IAC's Petition for Reconsideration.

123. *Background.* IAC was the high bidder on fifteen IVDS licenses in Auction No. 2. IAC, however, failed to make the required initial down payments on the licenses. Instead, IAC requested a waiver, seeking postponement of the initial payment deadline, which the Commission denied.[366]

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363 *See Part 1 Third Report and Order*, 13 FCC Rcd at 403-04, ¶ 47.

364 *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974 (1996) ("*Tenth Report and Order*").

365 IAC Petition for Reconsideration, filed December 27, 1996.

366 *See* Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd 6384 (Com. Car. Bureau 1994) (request for waiver denied); Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 10 FCC Rcd 12153 (1995) (petition for reconsideration denied); Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 11 FCC Rcd 8211 (1996) (application for review denied).

Thereafter, IAC sought appellate review of these decisions.[367] On November 23, 1996, the Commission released the *Tenth Report and Order*, which established rules to govern the then-planned second auction of IVDS licenses (Auction No. 13).[368] On December 4, 1996, the Bureau released a public notice announcing Auction No. 13, scheduled to begin February 18, 1997, and listing as available for auction the fifteen licenses on which IAC defaulted.[369] On December 27, 1996, IAC filed a petition for reconsideration of the *Tenth Report and Order*. In its petition, IAC contends that the Commission did not disclose IAC's pending appeal, thereby failing to disclose all material facts about the licenses subject to auction.[370] IAC further contends that the Commission should postpone any IVDS auction until adoption of final rules.[371]

124. *Discussion.* Intervening circumstances have made IAC's Petition for Reconsideration moot. First, on January 29, 1997, the Bureau postponed Auction No. 13 "to give the Commission an opportunity to consider [various] requests of

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367 *See Interactive America Corp. v. F.C.C.*, No. 96-1320 (D.C. Cir., filed September 6, 1996), consolidated with *Commercial Realty St. Pete, Inc. v. F.C.C.*, No. 96-1271 (D.C. Cir., filed August 7, 1996).

368 *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974 (1996) ("*Tenth Report and Order*"). The *Tenth Report and Order* established competitive bidding rules governing the second auction of the Interactive Video and Data Service (Auction No. 13).

369 *See* "Auction of Interactive Video and Data Service (IVDS) – Auction Notice and Filing Requirements for 981 IVDS Licenses Scheduled for February 18, 1997," *Public Notice*, 11 FCC Rcd 20950 (1996).

370 IAC Petition for Reconsideration at 2-3.

371 *Id. at* 3.

potential bidders and license holders seeking to obtain additional flexibility for the service."[372] In addition, on May 22, 1997, the United States Court of Appeals for the District of Columbia Circuit denied on the merits IAC's petition for review, thereby rendering moot IAC's argument on reconsideration that the Commission should provide full disclosure of pending proceedings that may affect the licenses to be auctioned.[373]

125. IAC's argument that the Commission should not hold an auction until final rules are adopted is rendered moot by today's action. Since the filing of IAC's petition, we have undertaken a comprehensive examination and modification of our regulations governing the licensing and use of the 218-219 MHz Service (*see* Section III., *supra*),[374] finalized our service rules,[375] and determined that our Part 1 competitive bidding

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372 "Wireless Telecommunications Bureau Postpones February 18, 1997 Auction Date for 981 Interactive Video and Data Service (IVDS) Licenses," *Public Notice*, 12 FCC Rcd 1389 (1997).

373 *See Commercial Realty St. Pete, Inc. v. F.C.C.*, 116 F.3d 941 (D.C. Cir., May 22, 1997) (unpublished opinion available at 1997 WL 358223), *reh'g denied* (D.C. Cir. Aug. 6, 1997), *cert. denied*, 118 S. Ct. 445 (Nov. 17, 1997) *and cert. denied*, 118 S. Ct. 629 (Dec. 15, 1997). We note that in every auction, we caution bidders that the Commission makes no representations or warranties about the use of spectrum for particular purposes and that applicants should perform their own due diligence. *See, e.g.*, "Auction of Local Multipoint Distribution Service; Auction Notice and Filing Requirements for 986 Basic Trading Area ("BTA") Licenses in the 28 GHz and 31 GHz Bands, Scheduled for December 10, 1997," *Public Notice*, 13 FCC Rcd 7754 (1997); *see also* Local Multipoint Distribution Service Bidder Information Package at 94.

374 *See also 218-219 MHz Flex Order*, 13 FCC Rcd at 19080-96.

375 *See* Final Rules attached hereto as Appendix B.

rules will be applicable to the 218-219 MHz Service (*see* Section IV.H., *supra*). Accordingly, IAC's petition for reconsideration is dismissed.

## VI. PROCEDURAL MATTERS

### A. Regulatory Flexibility Act

126. A Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

### B. Final Paperwork Reduction Act of 1995 Analysis

127. This *Report and Order* contains a modified information collection, which has been submitted to the Office of Management and Budget (OMB) for approval. As part of our continuing effort to reduce paperwork burdens, we invite the public and other government agencies to take this opportunity to comment on the information collection contained in this *Report and Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 30 days from publication of this Report and Order in the Federal Register. Comments should address the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. A copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, room

1-C804, 445 12th Street S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov.

## C. Further Information

128. For further information concerning this *Report and Order*, contact Jamison Prime, Shellie Blakeney, or Nick Kolovos of the Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau at (202) 418-0680 (voice), (202) 418-7233 (TTY); or Robert Allen of the Auctions and Industry Analysis Division, Wireless Telecommunications Bureau at (202) 418-0660 (voice), (202) 418-7233 (TTY).

## VII. ORDERING CLAUSES

129. Accordingly, IT IS ORDERED that, pursuant to the authority of sections 4(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a), that 47 C.F.R Parts 20 and 95 of the Commission's Rules ARE AMENDED as set forth in Appendix B, effective sixty days after publication in the *Federal Register*, following OMB approval, unless a notice is published in the *Federal Register* stating otherwise.

130. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

131. IT IS FURTHER ORDERED that the waiver requests of Jay M. Liberman and Michael R. Walton, dba J&M Partnership, Ronald E. Dowdy, and Raveesh K. Kumra ARE GRANTED insofar as the proposed waivers are consistent with the new rules we adopt herein and ARE DENIED in all other respects.

132. IT IS FURTHER ORDERED that Rulemaking docket number RM-8951, established in response to the Petition for Rulemaking and associated amendments filed by Euphemia Banas, *et al*, IS TERMINATED.

133. IT IS FURTHER ORDERED that the Emergency Motion for Stay of Community Teleplay, Inc. IS DISMISSED as moot.

134. IT IS FURTHER ORDERED that, pursuant to 47

U.S.C. § 155(c), 47 C.F.R. § 0.331, and 47 C.F.R. § 0.11(a)(8), the Chief of the Wireless Telecommunications Bureau, and the Managing Director, ARE GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

135. IT IS FURTHER ORDERED that, in light of the remedial action ordered above, the Application for Review of Community Teleplay, Inc., *et al.* IS DISMISSED in part as moot and DENIED in all other respects.

136. IT IS FURTHER ORDERED that the Motion for Leave to File Supplement to Emergency Petition for Relief and Request for Expedited Consideration of Graceba Total Communications, Inc. IS GRANTED.

137. IT IS FURTHER ORDERED that the Emergency Petition for Relief and Request for Expedited Consideration of Graceba Total Communications, Inc., and the Petition for Action on Remand and Supplement to Emergency Petition for Relief and Request for Expedited Consideration of Graceba Total Communications, Inc. ARE GRANTED in part to the extent described above and ARE DENIED in all other respects.

138. IT IS FURTHER ORDERED that all pending grace period requests filed by current or former 218-219 MHz Service licensees ARE DISMISSED.

139. IT IS FURTHER ORDERED that the Petition for Reconsideration of Interactive America Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

**Magalie Roman Salas**
**Secretary**

## APPENDIX A - Commenters and Reply Commenters

### Appendix A, Part 1: List of Commenters

| Comment Filer's Name | Abbreviation |
|---|---|
| 218-219 MHz Licensees | 218-219 Group |
| AirTouch Paging | AirTouch |
| Bay Area 218-219 MHz Group | Bay Area |
| Boston Spectrum Associates, LLC, and Houston Spectrum Associates, LLC | Boston/Houston |
| Concepts to Operations, Inc. (Stanley Cohn) | Concepts |
| Commercial Realty St. Pete, Inc. | CRSPI |
| Community Teleplay, Inc. | Community |
| Dispatch Interactive Television Company | Dispatch |
| EON Corporation | EON |
| Hughes, Kingdon R. | Hughes |
| In-Sync Interactive Corporation | In-Sync |
| Interactive Services Trade Association | ISTA |
| ITV, Inc. and IVDS Affiliates, LLC | ITV |
| IVDS Enterprises Joint Venture | IVDS Enterprises |
| IVDS/RLV, L.L.C. and Friends of IVDS, Inc. | IVDS/RLV |
| MKS Interactive, Inc. | MKS |
| Petty, Gary L. | Petty |
| Radio Telecom & Technology Inc. | RTT |
| Rand McNally & Company | Rand McNally |
| Two Way TV, Inc. | Two Way |

### Appendix A, Part 2: List of Reply Commenters

| Reply Comment Filer's Name | Abbreviation |
|---|---|
| 218-219 MHz Licensees | 218-219 Group |

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|---|---|
| Boston Spectrum Associates, LLC, and Houston Spectrum Associates, LLC | Boston/Houston |
| Commercial Realty St. Pete, Inc. | CRSPI |
| Community Teleplay, Inc. | Community |
| Concepts to Operations, Inc. | Concepts |
| Dispatch Interactive Television Company | Dispatch |
| Eagle Interactive Partner, Inc. | Eagle |
| EON Corporation | EON |
| Hispania & Associates, Inc. (Alejandro Calderon) | Hispania |
| Hughes, Kingdon R. | Hughes |
| In-Sync Interactive Corporation | In-Sync |
| Interactive Innovations, Inc. | Interactive |
| Interactive Video Data Service Trade Association | ISTA |
| IVDS Coalition | Coalition |
| Phoenix Data Communication, Inc. | Phoenix |
| Two Way TV, Inc. | Two Way |

## APPENDIX B - FINAL RULES

**Parts 1, 20 and 95 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:**

### A. PART 1 — PRACTICE AND PROCEDURE

1. Section 1.2105 is amended to revise paragraph (a)(2)(xi) is to read as follows:

**§ 1.2105 Bidding application and certification procedures; prohibition of collusion.**

(a) * * *

(2) * * *

(xi) For C block and 218-219 MHz Service applicants, an attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency.

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### B. PART 20 — COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 is revised to read as follows:

**AUTHORITY: Secs. 4, 251, 252, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251, 252, 303, and**

**332, unless otherwise noted.**

2. Section 20.9 is amended by redesignating paragraph (a)(12) as (a)(13), redesignating (a)(13) as (a)(14), and inserting a new paragraph (a)(12) as follows:

**§ 20.9 Commercial mobile radio services.**

(a) * * *

(12) Mobile operations in the 218-219 MHz Service (part 95, subpart F of this chapter) that provide for-profit interconnected service to the public;

* * * * *

## C. PART 95 — PERSONAL RADIO SERVICES

1. The authority citation for Part 95 is revised to read as follows:

**AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.**

2. Section 95.1 is amended to revise paragraph (b) to read as follows:

GENERAL PROVISIONS

**§ 95.1 The General Mobile Radio Service (GMRS).**

(a) * * *

(b) The 218-219 MHz Service is a two-way radio service authorized for system licensees to provide

communication service to subscribers in a specific service area. The rules for this service are contained in subpart F of this part.

* * * * *

3. Section 95.801 is amended to read as follows:

**Subpart F - 218-219 MHz Service**

GENERAL PROVISIONS

**§ 95.801 Scope.**

This subpart sets out the regulations governing the licensing and operation of a 218-219 MHz system. This subpart supplements Part 1, Subpart F of this chapter, which establishes the requirements and conditions under which commercial and private radio stations may be licensed and used in the Wireless Telecommunications Services. The provisions of this subpart contain additional pertinent information for current and prospective licensees specific to the services governed by this Part 95.

4. Section 95.803 is amended to read as follows:

**§ 95.803 218-219 MHz Service description.**

(a) The 218-219 MHz Service is a two-way radio service authorized for system licensees to provide communication service to subscribers in a specific service area.

(b) The components of each 218-219 MHz Service system are its administrative apparatus, its response transmitter units (RTUs), and one or more cell transmitter stations (CTSs). RTUs may be used in any location within the service area

5. Section 95.805 is amended to read as follows:

**§ 95.805 Permissible communications.**

A 218-219 MHz Service system may provide any fixed or mobile communications service to subscribers within its service area on its assigned spectrum, consistent with the Commission's rules and the regulatory status of the system to provide services on a common carrier or private basis.

6. Section 95.807 is added to read as follows:

**§ 95.807 Requesting regulatory status.**

(a) Authorizations for systems in the 218-219 MHz Service will be granted to provide services on a common carrier basis or a private basis, or on both a common carrier and private basis in a single authorization.

(1) Initial applications. An applicant will specify on FCC Form 601 if it is requesting authorization to provide services on a common carrier basis, a private basis, or on both a common carrier and private basis.

(2) Amendment of pending applications. Any pending application may be amended to: (i) change the carrier status requested; or (ii) add to the pending request in order to obtain both common carrier and private status in a single license.

(3) Modification of license. A licensee may modify a license to: (i) change the carrier status
authorized; or (ii) add to the status authorized in order to obtain both common carrier and private status in a single license. Applications to change, or add to, carrier status in a license must be submitted on FCC Form 601 in accordance with

Section 1.1102 of this chapter.

(4) Pre-existing licenses. Licenses issued before [effective date of rules] are authorized to provide services on a private basis. Licensees may modify this initial status pursuant to Paragraph (a)(3) of this Section.

(b) An applicant or licensee may submit a petition at any time requesting clarification of the regulatory status required to provide a specific communications service.

* * * * *

7. Section 95.811 is revised to modify paragraphs (b), (c), and (d) to read as follows:

SYSTEM LICENSE REQUIREMENTS

**§ 95.811 License requirements.**

(a) * * *

(b) A CTS must be individually licensed to the 218-219 MHz Service licensee for the service area in which the CTS is located in accordance with Part 1, Subpart F of this chapter if it:

(1) is in the vicinity of certain receiving locations (see § 1.924 of this chapter);

(2) may have significant environmental effect (see part 1, subpart I of this chapter);

(3) is part of an antenna structure that requires notification to the Federal Aviation Administration (see part 17,

subpart B of this chapter); or

(4) has an antenna the tip of which exceeds:

(i) 6.1 meters (20 feet) above ground level; or

(ii) 6.1 meters (20 feet) above the top of an existing man-made structure (other than an antenna structure) on which it is mounted.

(c) All CTSs not meeting the licensing criteria under paragraph (b) of this Section are authorized under the 218-219 MHz Service system license.

(d) Each component RTU in a 218-219 MHz Service system is authorized under the system license or if associated with an individually licensed CTS, under that CTS license.

8. Section 95.812 is added to read as follows:

**§ 95.812 License term.**

(a) The term of each 218-219 MHz Service system license is ten years from the date of original issuance or renewal.

(b) Licenses for individually licensed CTSs will be issued for a period running concurrently with the license of the associated 218-219 MHz Service system with which it is licensed.

9. Section 95.813 is revised to modify paragraph (b) and to remove paragraph (c) to read as follows:

**§ 95.813 License eligibility.**

(a) * * *

(b) An entity that loses its 218-219 MHz Service authorization due to failure to meet the construction requirements specified in § 95.833 of this part may not apply for a 218-219 MHz Service system license for three years from the date the Commission takes final action affirming that the 218-219 MHz Service license has been canceled.

10. Section 95.815 is revised to modify paragraph (a) and (b) to read as follows:

**§ 95.815 License application.**

(a) In addition to the requirements of part 1, subpart F of this chapter, each application for a 218-219 MHz Service system license must include a plan analyzing the co- and adjacent channel interference potential of the proposed system, identifying methods being used to minimize this interference, and showing how the proposed system will meet the service requirements set forth in § 95.831 of this part. This plan must be updated to reflect changes to the 218-219 MHz Service system design or construction.

(b) In addition to the requirements of part 1, subpart F of this chapter, each request by a 218-219 MHz Service system licensee to add, delete, or modify technical information of an individually licensed CTS (*see* § 95.811 (b) of this part) * * *

11. Section 95.816 is revised to read as follows:

**§ 95.816 Competitive bidding proceedings.**

(a) Mutually exclusive initial applications for 218-219 MHz Service system licenses are subject to competitive bidding procedures. The procedures set forth in Part 1, Subpart Q of this chapter will apply unless otherwise provided in this part.

(b) *Installment payments*. Eligible Licensees that elect resumption pursuant to Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239 (released September 10, 1999) may continue to participate in the installment payment program. Eligible Licensees are those that were current in installment payments (*i.e.* less than ninety days delinquent) as of March 16, 1998, or those that had properly filed grace period requests under the former installment payment rules. All unpaid interest from grant date through election date will be capitalized into the principal as of Election Day creating a new principal amount. Installment payments must be made on a quarterly basis. Installment payments will be calculated based on new principal amount as of Election Day and will fully amortize over the remaining term of the license. The interest rate will equal the rate for five-year U.S. Treasury obligations at the time of licensing.

(c) *Eligibility for small business provisions.*

(1) A small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed $15 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed $3 million for the preceding three years.

(3) For purposes of determining whether an entity

meets either of the definitions set forth in paragraph (b)(1) or (b)(2) of this section, the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

(4) Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(5) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (b)(1) of this section (or each of which individually satisfies the definition in paragraph (b)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

(d) *Controlling interest.*

(1) For purposes of this section, controlling interests includes individuals or entities with *de jure* and *de facto* control of the applicant. *De jure* control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(2) *Calculation of certain interests.*

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person, or its affiliate pursuant to § 1.2110(b)(4) of this chapter, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make

decisions or otherwise engage in practices or activities that determine, or significantly influence:

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(f) *Bidding credits.* A winning bidder that qualifies as a small business or a consortium of small businesses as defined in this subsection may use the bidding credit specified in § 1.2110(e)(2)(ii) of this chapter. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in this subsection may use the bidding credit specified in accordance to § 1.2110(e)(2)(i) of this chapter.

(g) Winning bidders in Auction No. 1, which took place on July 28-29, 1994, that, at the time of that auction, met the qualifications under the Commission's rules then in effect, for small business status will receive a twenty-five percent bidding credit pursuant to Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239 (released September 10, 1999).

12. Section 95.819 is revised to read as follows:

**§ 95.819 License transferability.**

(a) A 218-219 MHz Service system license acquired through competitive bidding procedures (including licenses

obtained in cases of no mutual exclusivity), together with all of its component CTS licenses, may be transferred, assigned, sold, or given away only in accordance with the provisions and procedures set forth in 47 C.F.R. § 1.2111.

(b) A 218-219 MHz Service system license obtained through random selection procedures, together with all of its component CTS licenses, may be transferred, assigned, sold, or given away, to any other entity in accordance with the provisions and procedures set forth in § 1.948 of this chapter.

(c) If the transfer, assignment, sale, or gift of a license is approved, the new licensee is held to the construction requirements set forth in § 95.833 of this part.

13. Section 95.823 is added to read as follows:

**§ 95.823 Geographic partitioning and spectrum disaggregation.**

(a) *Eligibility.* Parties seeking Commission approval of geographic partitioning or spectrum disaggregation of 218-219 MHz Service system licenses shall request an authorization for partial assignment of license pursuant to § 1.948 of this chapter.

(b) *Technical standards.*

(i) *Partitioning.* In the case of partitioning, requests for authorization of partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation

of the population of the partitioned service area and the

licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 seconds along the partitioned service area unless an FCC-recognized service area (*i.e.* Economic Areas) is utilized or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds, to the nearest second of latitude and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where an FCC-recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum maybe disaggregated in any amount.

(3) *Combined partitioning and disaggregation.* The Commission will consider requests for partial assignments of licenses that propose combinations of partitioning and disaggregation.

(c) *Provisions applicable to designated entities.*

(1) *Unjust Enrichment. See* § 1.2111(e) of this chapter.

(2) *Parties Not Qualified For Installment Payment Plans.*

(i) When a winning bidder (partitionor or disaggregator) that elected to pay for its license through an installment payment plan partitions its license or disaggregates spectrum to another party (partitionee or disaggregatee) that would not qualify for an installment payment plan, or elects not to pay for its share of the license through installment payments, the outstanding principal balance owed by the partitionor or

disaggregator shall be apportioned according to § 1.2111(e)(3) of this chapter. The partitionor or disaggregator is responsible for accrued and unpaid interest through and including the consummation date.

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire *pro rata* amount of the outstanding principal balance on or before the consummation date. Failure to meet this condition will result in cancellation of the grant of the partial assignment application.

(iii) The partitionor or disaggregator shall be permitted to continue to pay its *pro rata* share of the outstanding balance and, if applicable, shall receive loan documents evidencing the partitioning and disaggregation. The original interest rate, established pursuant to § 1.2110(f)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to the partitionor's or disaggregator's portion of the remaining government obligation.

(iv) A default on the partitionor's or disaggregator's payment obligation will affect only the partitionor's or disaggregator's portion of the market.

(3) *Parties Qualified For Installment Payment Plans.*

(i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation.

(ii) Each party may be required, as a condition to approval of the partial assignment application, to execute

loan documents agreeing to pay its *pro rata* portion of the outstanding principal balance due, as apportioned according to § 1.2111(e)(3) of this chapter, based upon the installment payment terms for which it qualifies under the rules. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to § 1.2110(f)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for its portion of the partitioned market.

(iii) A default on an obligation will affect only that portion of the market area held by the defaulting party.

(d) *Construction Requirements.*

(1) *Partitioning.* Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently satisfy the applicable construction requirements set forth in § 95.833 of this part for their respective partitioned areas. If either licensee failed to meet its requirement in § 95.833 of this part, only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the requirement in § 95.833 of this part for the entire market. If the partitionor fails to meet the requirement in § 95.833 of this part, however, only its renewal application would be subject to forfeiture at renewal.

(2) *Disaggregation.* Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the first option, the disaggregator and

disaggregatee would certify that they each will share responsibility for meeting the applicable construction requirements set forth in § 95.833 of this part for the geographic service area. If parties choose this option and either party fails to do so, both licenses would be subject to forfeiture at renewal. The second option would allow the parties to agree that either the disaggregator or the disaggregatee would be responsible for meeting the requirement in § 95.833 of this part for the geographic service area. If parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the non-performing party would be subject to forfeiture at renewal.

(3) All applications requesting partial assignments of license for partitioning or disaggregation must include the above-referenced certification as to which of the construction options is selected.

(4) Responsible parties must submit supporting documents showing compliance with the respective construction requirements within the appropriate construction benchmarks set forth in § 95.833 of this part.

14. Section 95.831 is revised to read as follows:

SYSTEM REQUIREMENTS

**§ 95.831 Service requirements.**

Subject to the initial construction requirements of § 95.833 of this subpart, each 218-219 MHz Service system license must demonstrate that it provides substantial service within the service area. Substantial service is defined as a service that is sound, favorable, and substantially above a level of service which might minimally warrant renewal.

15. Section 95.833 is revised to read as follows:

**§ 95.833 Construction requirements.**

(a) Each 218-219 MHz Service licensee must make a showing of "substantial service" within ten years of the license grant. A "substantial service" assessment will be made at renewal pursuant to the provisions and procedures contained in § 1.949 of this chapter.

(b) Each 218-219 MHz Service licensee must file a report to be submitted to inform the Commission of the service status of its system. The report must be labeled as an exhibit to the renewal application. At minimum, the report must include:

(1) A description of its current service in terms of geographic coverage and population served;

(2) An explanation of its record of expansion, including a timetable of new construction to meet changes in demand for service;

(3) A description of its investments in its 218-219 MHz Service systems;

(4) A list, including addresses, of all component CTSs constructed; and

(5) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and a list of any pending proceedings that relate to any matter described in this paragraph.

(c) Failure to demonstrate that substantial service is

being provided in the service area will result in forfeiture of the license, and will result in the licensee's ineligibility to apply for 218-219

MHz Service licenses for three years from the date the Commission takes final action affirming that the 218-219 MHz Service license has been canceled pursuant to § 95.813 of this part.

16. Section 95.853 is revised to read as follows:

**§ 95.853 Frequency segments.**

There are two frequency segments available for assignment to the 218-219 MHz Service in each service area. Frequency segment A is 218.000-218.500 MHz. Frequency segment B is 218.501-219.000 MHz.

17. Section 95.855 is revised to read as follows:

**§ 95.855 Transmitter effective radiated power.**

The effective radiated power (ERP) of each CTS and RTU shall be limited to the minimum necessary for successful communications. No CTS or fixed RTU may transmit with an ERP exceeding 20 watts. No mobile RTU may transmit with an ERP exceeding 4 watts.

18. Section 95.859 is revised to modify paragraph (a) and to remove and reserve paragraph (b) to read as follows:

**§ 95.859 Antennas.**

(a) The overall height from ground to topmost tip of the

CTS antenna shall not exceed the height necessary to assure adequate service. Certain CTS antennas must be individually licensed to the 218-219 MHz System licensee (*see* § 95.811(b) of this part) and the antenna structures of which they are a part must be registered with the Commission (*see* part 17 of this chapter).

(b) [Removed and reserved]

(c) * * *

19. Section 95.861 is revised to read as follows:

**§ 95.861 Interference.**

(a) When a 218-219 MHz Service system suffers harmful interference within its service area or causes harmful interference to another 218-219 MHz Service system, the licensees of both systems must cooperate and resolve the problem by mutually satisfactory arrangements. If the licensees are

unable to do so, the Commission may impose restrictions including, but not limited to, specifying the transmitter power, antenna height or area, duty cycle, or hours of operation for the stations concerned.

(b) The use of any frequency segment (or portion thereof) at a given geographical location may be denied when, in the judgment of the Commission, its use in that location is not in the public interest; the use of a frequency segment (or portion thereof) specified for the 218-219 MHz Service system may be restricted as to specified geographical areas, maximum power, or other operating conditions.

(c) A 218-219 MHz Service licensee must provide a copy of the plan required by § 95.815 (b) of this part to every TV Channel 13 station whose Grade B predicted contour overlaps the licensed service area for the 218-219 MHz Service system. The 218-219 MHz Service licensee must send the plan to the TV Channel 13 licensee(s) within 10 days from the date the 218-219 MHz Service licensee submits the plan to the Commission. and the 218-219 MHz Service licensee must send updates to this plan to the TV Channel 13 licensee(s) within 10 days from the date that such updates are filed with the Commission pursuant to § 95.815 (b) of this part.

(d) Each 218-219 MHz Service system licensee must provide upon request, and install free of charge, an interference reduction device to any household within a TV Channel 13 station Grade B predicted contour that experiences interference due to a component CTS or RTU.

(e) Each 218-219 MHz Service system licensee must investigate and eliminate harmful interference to television broadcasting and reception, from its component CTSs and RTSs, within 30 days of the time it is notified in writing, by either an affected television station, an affected viewer, or the Commission, of an interference complaint. Should the licensee fail to eliminate the interference within the 30-day period, the CTS(s) or RTU(s) causing the problem(s) must discontinue operation.

(f) The boundary of the 218-219 MHz Service system, as defined in its authorization, is the limit of interference protection for that 218-219 MHz Service system.

20. Section 95.863 is removed.

# APPENDIX C
# FINAL REGULATORY FLEXIBILITY ANALYSIS

*Report and Order*

As required by the Regulatory Flexibility Act (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking.*[2] The Commission sought written public comment on the proposals in the *218-219 MHz Flex NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

## I. Need for, and Objectives of, the Report and Order:

This rulemaking proceeding was initiated to secure

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064, 19101 (1998) (*218-219 MHz Flex NPRM*).

[3] *See* 5 U.S.C. § 604.

public comment on proposals to maximize the efficient and effective use of spectrum in the 218-219 MHz band, allocated in 1992 to the Interactive Video and Data Service (IVDS) in the Personal Radio Services, now redesignated as the 218-219 MHz Service. In attempting to maximize the use of the 218-219 MHz band, we continue our efforts to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, facilitate technological innovation, and provide opportunities for development of competitive new service offerings. The rules adopted in this *Report and Order* are also designed to implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services in accordance with Section 309(j) of the Communications Act of 1934, as amended (the Communications Act).[4]

## II. Summary of Significant Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No petitions were filed in direct response to the IRFA. In general, commenters and reply commenters supported our proposals to provide additional flexibility in the 218-219 MHz Service. Moreover, many of the commenters and reply commenters were existing 218-219 MHz Service licensees many of whom, as discussed *infra*, qualify as small businesses. These commenters overwhelmingly supported proposals that would permit (1) acquisitions by partitioning or disaggregation; (2) 218-219 MHz Service licensees and applicants to choose regulatory status; and (3) non-defaulting 218-219 MHz Service licensees currently participating in the installment payment plan to elect one of three restructuring plans concerning their

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[4] 47 U.S.C. §§ 257, 309(j).

outstanding payments, despite the increased reporting requirements that these proposals may entail.

## III. Description and Estimate of the Number of Small Entities to which the Rules Apply:

The Regulatory Flexibility Act directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The Regulatory Flexibility Act generally defines the term "small entity " as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate for its activities.[5] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[6] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[7] Below, we further describe and estimate the number of small entity

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5 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

6 Small Business Act, 15 U.S.C. § 632 (1996).

7 5 U.S.C. § 601(4).

licensees and regulatees that may be affected by the proposed rules, if adopted.

The rules adopted in this *Report and Order* affect a number of small entities who are either licensees, or who may choose to become applicants for licenses, in the 218-219 MHz Service. Such entities fall into two categories: (1) those using the 218-219 MHz Service for providing interactivity capabilities in conjunction with broadcast services; and (2) those using the 218-219 MHz Service to operate other types of wireless communications services with a wide variety of uses, such as commercial data applications and two-way telemetry services. Theoretically, an entity could fall into both categories. The spectrum uses in the two categories differ markedly.

With respect to the first category, the provision of interactivity capabilities in conjunction with broadcast services could be described as a wireless provider of subscription television service. The SBA's rules applicable to subscription television services define small entities as those with annual gross revenues of $11 million or less.[8] In the *Competitive Bidding Tenth Report and Order*, we extended special competitive bidding provisions to small businesses with annual gross revenues that are not more than $15 million, and additional benefits to very small businesses with annual gross revenues that are not more than $3 million.[9] On January 6, 1998, the SBA approved of the small business size standards

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[8] 13 C.F.R. § 121.201, SIC Code 4841.

[9] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19981-85 (1996) (*Competitive Bidding Tenth Report and Order*), *recon. pending*.

established in the *Competitive Bidding Tenth Report and Order*.[10]

The Commission's estimate of the number of small business entities operating in the 218-219 MHz band for interactivity capabilities with television viewers begins with the 1992 Bureau of Census report on businesses listed under SIC Code 4841, subscription television services, which is the most recent information available. The total number of entities under this category is 1,788.[11] There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services.[12] We know that many of these businesses are cable and television service businesses, rather than businesses operating in the 218-219 MHz band. We also know that, to date, we have issued 612 licenses in the 218-219 MHz Service. Therefore, the number of small entities currently providing interactivity capability to television viewers in the 218-219 MHz Service which will be subject to the rules will be less than 612.

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[10] *See* Letter to Daniel B. Phythyon, Chief, WTB, from Aida Alverez, Administrator, SBA, Dated Jan. 6, 1998.

[11] U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC Code 4841 (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

[12] The Census table divides those companies by the amount of annual receipts. There is a dividing point at companies with annual receipts of $10 million. The next increment is annual receipts of $17 million, a category that greatly exceeds the SBA definition of small businesses that provide subscription television services. However, there are 17 firms in this category, with revenues between $10-$17 million. Approximately 1,480 SIC Code 4841 category firms have annual gross receipts of $15 million or less. Only a small fraction of those 1,480 firms provide IVDS.

With respect to the second category, neither the Commission nor the SBA has developed a specific definition of small entities applicable to 218-219 MHz band licensees that would provide wireless communications services other than that described above. Generally, the applicable definition of a small entity in this instance appears to be the definition under the SBA rules applicable to establishments primarily engaged in furnishing telegraph and other message communications, SIC Code 4822. This definition provides that a small entity is an entity with annual receipts of $5 million or less.[13] The 1992 Census data, which is the most recent information available, indicates that of the 286 firms under this category, 247 had annual receipts of $4.999 million or less.[14]

The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, we defined a small business as an entity, together with its affiliates, that has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[15] We cannot estimate, however, the number of licenses

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[13] 13 C.F.R. § 121.201, SIC Code 4822.

[14] 1992 Economic Census Industry and Enterprise Receipts Size Report, U.S. Bureau of the Census, U.S. Department of Commerce, Table 2D, SIC Code 4822 (industry data prepared by the Census Bureau under contract to the U.S. SBA Office of Advocacy).

[15] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330, 2336 (1994).

that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the above discussion regarding the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, all of the licenses may be awarded to small businesses, which would be affected by the rule changes we propose.

## IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The final rules adopted in this *Report and Order* alter the reporting and recordkeeping requirements for a number of small business entities. Specifically, (1) 218-219 MHz Service licensees will not be required to file a license renewal application after five years from the date of grant of the license, but will be required to file a license renewal application after ten years after the date of grant of the license; (2) 218-219 MHz Service licensees will not be required to file construction reports at specified intervals after initial licensure, but will be obligated to demonstrate that they are providing "substantial service" as a condition for renewal of their license; and (3) acquisitions by partitioning or disaggregation will be treated as assignments of a license and parties will be required to comply with the 218-219 MHz Service licensing requirements. In addition small business may make elections under the final rules that will alter their reporting and recordkeeping requirements. Specifically, (1) 218-219 MHz Service licensees and applicants may choose to elect regulatory status (common carrier, private, commercial mobile radio service, private mobile radio service) and file appropriate documentation coincident with the regulatory status elected; (2) non-defaulting 218-219 MHz Service licensees currently

participating in the installment payment plan may elect one of three restructuring plans concerning their outstanding payments; and (3) 218-219 MHz Service licensees electing to continue making installment payments may be required to execute loan documents as a condition of the reamortization of its installment payment plan under the revised ten-year term.

## V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

In response to general comments filed in this proceeding we have adopted final rules designed to maximize opportunities for participation by, and growth of, small businesses in providing wireless services. Specifically, we expect that the extension of license terms from five to ten years and allowing partitioning and disaggregation of licenses, will specifically assist small businesses. We adopted a plan that provided for a reamortization of installment payment debt in conjunction with the extension of license term that differed from our original proposal in specific response to concerns raised in comments and reply comments. Commenters noted that our original proposal would have required licensees to pay two years worth of principal payments, as well as the accrued interest, in a lump sum, within ninety days of the *Report and Order* to retain their licenses, and claimed that such a plan would not allow licensees – in particular, small businesses – sufficient time to make new capital arrangements.[16] Commenters proposed a variety of means of providing relief beyond that which we proposed in the *218-219 MHz Flex NPRM*. We note that some of these proposals – such as a ten-

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[16] *See supra*, para. 42.

year payout schedule that would be entirely interest-free[17] – may have resulted in greater relief than that provided by the reamortization procedures adopted in the *Report and Order*.

We also believe that our proposals regarding permissible uses of 218-219 MHz Service, liberalization of construction requirements and technical restrictions, and elimination of the cross-ownership restriction, will make expansion of 218-219 MHz Service operations easier, and this flexibility assists all licensees, including small business licensees. We considered proposals by small business interests to eliminate (instead of liberalize) technical restrictions for the service,[18] but concluded that limited technical restrictions are still necessary in order to protect other licensees offering services (such as TV Channel 13 broadcasting) operating in or in close proximity of the 218-219 MHz band. We further believe that by retroactively applying a bidding credit for small businesses to the IVDS auction and by adopting our general auction rules that provide for small business bidding credits, we will maximize opportunities for participation by, and growth of, small businesses in the 218-219 MHz Service. For these reasons, we did not consider any significant alternatives to our proposals to minimize significant economic impact on small entities, nor were any significant alternatives of this nature proposed by commenters and reply commenters.

**Report to Congress**: The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996,

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17 *See* CRSPI Reply Comments at 2.

18 *See, e.g.*, Petty Comments at 1.

*see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
| | ) | |
| Amendment of Part 95 of the | ) | WT Docket No. 98-169 |
| Commission's Rules to Provide | ) | |
| Regulatory Flexibility in the | ) | |
| 218-219 MHz Service | ) | |

# SECOND ORDER ON RECONSIDERATION OF THE REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER

**Adopted: November 22, 2000**
**Released: December 13, 2000**

By the Commission:

## I. INTRODUCTION

1. On September 10, 1999, the Federal Communications Commission ("Commission") issued the *218-219 MHz Order,* which modified the regulations governing the licensing of the 218-219 MHz Service (formerly known as the Interactive Video and Data Service ("IVDS")) to maximize the

efficient and effective use of the band.[1] The *218-219 MHz Order*, among other things, modified service and technical rules for the band and extended the license term from five to ten years, eliminated the three- and five-year construction benchmarks, and adopted a "substantial service" analysis to be assessed at the expiration of the 218-219 MHz license term as a condition of renewal.[2] The Commission also adopted a restructuring plan for existing licensees that had participated in the installment payment program and that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules ("Eligible Licensees").[3]

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[1] Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239, WT Docket No. 98-169, RM-8951, 15 FCC Rcd. 1497, 1499 ¶ 2 (1999)("*218-219 MHz Order*"), *on recon*, *Order*, 14 FCC Rcd 21078 (1999)("*218-219 MHz Recon. Order*"). Initially designated as IVDS, the service was redesignated the 218-219 MHz Service to reflect the breadth of services available in this spectrum. *See* Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd. 19064, 19075 ¶ 16 (1998)("*218-219 MHz Flex Order*," "*218-219 MHz Flex M.O&O.*," or "*218-219 MHz Flex NPRM*").

[2] *218-219 MHz Order*, 15 FCC Rcd. at 1517, 1537-1538 ¶¶ 31, 68, 70.

[3] *See Id.* 15 FCC Rcd. at 1518, 1520 ¶¶ 34, 37. The installment payment grace period rules previously in effect were changed in Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) ("*Part 1 Third Report and*

Those licensees that had paid in full are not eligible to participate in the restructuring plan as they no longer owe a debt to the Commission and no public policy goal would be served by allowing them to participate. Pursuant to the restructuring plan, Eligible Licensees must make elections on a per license basis, choosing among three options: (i) Reamortization and Resumption of Payments; (ii) Amnesty; or (iii) Prepayment (Prepayment-Retain or Prepayment-Return).[4] If an Eligible Licensee elects Reamortization and Resumption of Payments the licensee retains one or more of its licenses and remains in the installment payment plan. The loan will be "reamortized" over the remaining term of the license. If an Eligible Licensee elects Amnesty its license is returned to the Commission in exchange for debt forgiveness of the outstanding principal balance and all interest payments due thereon. The Commission retains the down payment. If an Eligible Licensee elects Prepayment it may return or retain as many licenses as it wishes. The Prepayment option applies to all of the licenses held by a licensee and cannot be combined with Amnesty or Reamortization/Resumption.

2. "Ineligible Entities" are those entities that made first and second down payments and: (i) made some installment payments, but were not current in their installment payments as of March 16, 1998, and did not have a grace period request on file in conformance with the former installment payment rules;

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*Order*"). More recently, the Commission further modified these rules. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, WT No. 97-82, FCC No. 00-274 (rel. August 14, 2000)("*Order on Reconsideration of the Part 1 Third Report and Order*").

[4] *See generally Id.* 15 FCC Rcd. at 1515-1518 ¶¶ 26-33.

or (ii) never made any installment payments and did not have a timely filed grace period request on file, in conformance with the former rules.[5] Ineligible Entities are not eligible to make elections, but will be granted debt forgiveness for any outstanding balances owed and have previously paid installment payments refunded.[6]

3. On November 24, 1999, on our own motion, we adopted the *218-219 MHz Recon. Order*, which modified our *218-219 MHz Order*. We eliminated the provision allowing an Eligible Licensee electing the Amnesty option to obtain a credit for seventy percent of its down payment and forego, for a period of two years from the start date of the next auction of the 218-219 MHz Service, eligibility to reacquire the surrendered licenses through either auction or any secondary market

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[5] 47 C.F.R. § 95.816(d)(3) (1994) (incorporating by reference 47 C.F.R. § 1.2110 (1994)).

[6] *218-219 MHz Order*, 15 FCC Rcd. at 1520-1521 ¶ 38. This debt treatment is subject to the following provisions: 31 U.S.C. § 3711 and 31 U.S.C. § 3720B. Under the Debt Collection Improvement Act no person may obtain any federal financial assistance if the person had an outstanding debt with any federal agency that is in a delinquent status, as determined under standards prescribed by the Secretary of Treasury. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B. On March 1, 2000, the Department of Justice authorized the reduction of debt owed to the United States in accordance with the debt relief provisions of the *218-219 MHz Order*. Implementation Procedures For The Report And Order And Memorandum Opinion And Order Addressing The 218-219 MHz Services (Formerly Known As Interactive Video And Data Services (IVDS)), *Public Notice*, DA 00-900 (rel. April 20, 2000) ("*Implementation Procedures PN*").

transaction.[7]

4. In response to the rulings in the *218-219 MHz Order*, we received seven petitions for reconsideration, one opposition to the petitions, and no replies.[8] We note that we did not receive any petitions for reconsideration in response to our *sua sponte 218-219 MHz Recon Order*. After considering the arguments raised in the filings, we affirm the *218-219 MHz Order*, as modified by the *218-219 MHz Recon. Order*, in its entirety. Additionally, we respond to certain requests for clarification contained in the filings and we make technical modifications to the rules.

## II. EXECUTIVE SUMMARY

5. The following is a synopsis of the major actions we adopt. In this *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, we:

- Affirm that the restructuring plan is limited to existing licensees that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules;

- Decline to expand the options offered in the restructuring

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[7] *218-219 MHz Recon. Order*, 14 FCC Rcd. 21078 (1999).

[8] A list of the parties that filed pleadings in response to the *218-219 MHz Order*, and the abbreviations used to refer to such parties, is attached as Appendix A. For the sake of consistency, we refer to filings as oppositions if they were filed at the time opposition were due, even if they are supportive of arguments raised in the petitions.

plan to include disaggregation;

- Decline to expand the options offered in the restructuring plan to include the return of the down payment;

- Affirm that the twenty-five percent bidding credit granted to all winning small business bidders in the 1994 auction of this service will not be extended to all winning bidders in the 1994 auction of this service; and

- Affirm that the new Part 1 rules regarding installment payments will apply to licensees in this service.

## VI. BACKGROUND

6. The 218-219 MHz Service is a short distance communications service that allows one- and two-way communications for both common carrier and private operations on a fixed or mobile basis.[9] The *1992 Allocation Report and Order*[10] established the 218-219 MHz Service with a 500 kilohertz frequency segment for two licenses in each of the 734 cellular-defined service areas.[11]

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[9] 47 C.F.R. §§ 95.803(a), 95.807(a).

[10] Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video and Data Services, GEN Docket No. 91-2, *Report and Order*, 7 FCC Rcd. 1630, 1630-33 (1992) ("*1992 Allocation Report and Order*"), *on recon.*, *Memorandum Opinion and Order*, 7 FCC Rcd. 4923 (1992), *further recon.*, *Second Memorandum Opinion and Order*, 8 FCC Rcd. 2787 (1993).

[11] *1992 Allocation Report and Order*, 7 FCC Rcd. at 1630-33. The 218.0-218.5 MHz block is frequency segment A, and the 218.5-219.0 MHz block is frequency segment B. 47 C.F.R. § 95.853(a). These service areas

7. We issued 218-219 MHz Service licenses by both random selection (lottery)[12] and competitive bidding (auction). In the Omnibus Budget Reconciliation Act of 1993 ("*1993 Budget Act*"), Congress authorized the Commission to award licenses for spectrum-based services by auction.[13] We subsequently determined that 218-219 MHz Service licenses should be awarded by competitive bidding and adopted rules and procedures for this licensing structure.[14] Using these

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consist of 306 Metropolitan Statistical Areas (MSAs) and 428 Rural Service Areas (RSAs). Thus, a total of 1468 licenses — consisting of 612 MSA licenses and 856 RSA licenses — were allocated for this service.

[12] On September 15, 1993, eighteen 218-219 MHz Service system licenses were awarded by lottery. They were granted on March 28, 1994. Interactive Video and Data Service Licenses Granted, *Public Notice*, Mimeo No. 42412 (rel. Mar. 30, 1994).

[13] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, S 6001(a)(3), 107 Stat. 312 (enacted August 10, 1993); 47 U.S.C. § 309(j).

[14] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2348 (1994) ("*Competitive Bidding Second Report and Order*"), *on recon.*, *Second Memorandum Opinion and Order*, 9 FCC Rcd. 7245 (1994) (determining that 218-219 MHz Service licenses should be awarded through competitive bidding and prescribing certain general rules and procedures to be used for all auctionable services); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd. 2330 (1994) ("*Competitive Bidding Fourth Report and Order*"), *on recon.*, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 19341 (1996) ("*Competitive Bidding Sixth M.O.&O.*") (establishing specific auction procedures for the 218-219 MHz Service, setting forth auction methodology and payment procedures, incorporating by reference many of the general rules and procedures set

procedures, we held the first auction in the 218-219 MHz Service on July 28 and 29, 1994 (Auction No. 2).[15] On January 18, 1995, February 28, 1995, and May 17, 1995, the Commission conditionally granted licenses to the winning bidders, subject to the bidder satisfying the terms of the auction rules, including down payment requirements.[16]

8. Under the Commission's competitive bidding rules in effect at the time of Auction No. 2, winning bidders that qualified as small businesses were allowed to pay twenty percent of their net bid(s) as a down payment and the remaining eighty percent in installments over the five-year term of the license(s), with interest-only payments for the first two years, and interest and principal payments amortized over the

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forth in the *Competitive Bidding Second Report and Order*, such as the installment payment and associated grace period rules, and establishing provisions such as installment payments to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women, collectively -- "designated entities," are afforded a meaningful opportunity to participate in 218-219 MHz Service auctions).

[15] Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44160 (rel. Aug. 2, 1994), *erratum*, *Public Notice*, Mimeo No. 44265 (rel. Aug. 9, 1994). A total of 594 MSA licenses were auctioned in the 298 MSAs that had not been licensed by lottery.

[16] *See* News Release, Interactive Video and Data Service (IVDS) Applications to be Granted January 18, 1995, Mimeo No. 51403 (rel. Dec. 29, 1994) (listing first group of grants); Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995, *Public Notice*, 10 FCC Rcd. 3388 (1995) (listing second group of grants); Interactive Channel, Inc., Adjustment of Down Payment for Interactive Video and Data Service (IVDS) Licenses, *Order*, 10 FCC Rcd. 4522 (1995)(final license grant from Auction No. 2).

remaining three years.[17] The first interest-only payment, due March 31, 1995, was deferred to June 30, 1995, pursuant to administrative action by the Office of Managing Director.[18] Subsequently, the Wireless Telecommunications Bureau ("Bureau") further stayed the date for making the initial interest-only payments pending Commission resolution of licensees' substantive requests related to the payment requirements.[19] The Commission lifted the stay effective January 5, 1996, on which date licensees were required to make the interest-only payments back-due from March 31, 1995 and June 30, 1995.[20] Although the interest-only payments due September 30, 1995 and December 31, 1995 remained uncollected,[21] we denied requests to set back the installment payment date and the first principal and interest payments were due on March 31, 1997.[22]

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[17] 47 C.F.R. § 95.816(d)(3) (1994) (incorporating by reference 47 C.F.R. § 1.2110 (1994)).

[18] Quarterly Installment Payments for IVDS "Auction" Licensees to Begin June 30, 1995, *Public Notice*, Mimeo No. 53031 (rel. Mar. 29, 1995)(OMD).

[19] Interactive Video and Data Service (IVDS) Licensees, Request for Stay to Postpone Commencement of Installment Payment Program, *Order*, DA 95-2029, 11 FCC Rcd. 3031 (1995) (WTB) ("*WTB IVDS Order*").

[20] Interactive Video and Data Service (IVDS) Licensees, Various Requests by Auction Winners, *Order*, 11 FCC Rcd. 1282, 1284 note 23, 1285 ¶ 19 (1995) ("*1995 IVDS Omnibus Order*").

[21] In the *218-219 MHz Flex NPRM*, these interest payments were referred to as "Suspension Interest."

[22] *218-219 MHz Order*, 15 FCC Rcd. at 1505 ¶ 11.

9. The Commission, in the *1995 IVDS Omnibus Order,* and the Bureau in the *IVDS Grace Period PN*, cautioned licensees that, in accordance with section 1.2110(e)(4)(ii)[23] of our Rules, if they individually required financial assistance, they should request a three- or six-month grace period during the first ninety days following any missed installment payments.[24] The Bureau further cautioned licensees that if a licensee failed to make timely payments, absent the filing of a grace period request, the license would be in default.[25] The Commission's rules in effect at that time provided that any licensee whose installment payment was more than ninety days past due was in default, unless the licensee properly filed a grace period request.[26] Under the Commission's rules, licensees with properly filed grace period requests would not be

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[23] 47 C.F.R. § 1.2110(e)(4)(ii)(1994).

[24] *1995 IVDS Omnibus Order,* 11 FCC Rcd. at 1285 ¶ 19; Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying By Installment Payments, *Public Notice*, DA 95-1617, 10 FCC Rcd. 10724 (1995) (WTB) ("*IVDS Grace Period PN*"); *see also* Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction, *Public Notice*, Mimeo 54270 (1995)(clarified grace period rule in the context of Personal Communications Services auction)("*PCS Grace Period PN*").

[25] *IVDS Grace Period PN*, 10 FCC Rcd. 10724 ("IVDS Licensees that elect to pay for their license in installments will have their license conditioned upon full and timely performance of all installment payment obligations. The Commission's rules provide that a licensee will be deemed in default on its installment payments if it is more than 90 days delinquent in making a payment to the government.").

[26] 47 C.F.R. § 1.2110(e)(4)(ii) and (iii)(1994); *see also* 47 C.F.R. § 95.816(c)(6)(1994) for references to default (incorporating by reference 47 C.F.R. § 1.2104 (1994)).

held in default during the pendency of their requests and the interest accruing would be amortized by adding it to the other interest payments over the remaining term of the license.[27] Upon expiration of any grace period without successful resumption of payment, or upon default with no such request submitted, the license would cancel automatically.[28] The Commission amended the installment payment rules in 1998 to provide for two automatic grace periods of ninety days, subject to late fees.[29] The 1998 amendment of the installment payment rules did not affect pending grace period requests filed by 218-219 MHz Service licensees.[30]

10. We have previously noted that deployment of the 218-219 MHz Service has not been successful despite previous steps we had taken to promote development of the 218-219 MHz Service.[31] Moreover, those licensees actually deploying services are providing service different than that originally envisioned when the service was established.[32] To promote full

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[27] *218-219 MHz Order*, 15 FCC Rcd. at 1505 ¶ 12 (*citing* 47 C.F.R. § 1.2110(e)(4)(ii)(iii) (1994)).

[28] *Id.*; *see also IVDS Grace Period PN*, 10 FCC Rcd. 10724; *PCS Grace Period PN*, Mimeo 54270.

[29] *Part 1 Third Report and Order*, 13 FCC Rcd. at 436; *see also* 47 C.F.R. § 1.2110(f)(4)(ii)(iii) (1998).

[30] *Part 1 Third Report and Order*, 13 FCC. Rcd. at 441-442 ¶ 113; *218-219 MHz Flex Order*, 13 FCC Rcd. at 19072 ¶ 30.

[31] *218-219 MHz Order*, 15 FCC Rcd. at 1505-1506 ¶ 13.

[32] *218-219 MHz Order*, 15 FCC Rcd. at 1506, note. 39, ¶ 13 (*citing* Community Teleplay's contention that after being unable to develop interactive television applications, it instead focused on wireless data

utilization of the service, we issued the 1998 *218-219 MHz Flex NPRM* that proposed changes to the 218-219 MHz Service licensing and technical rules.[33] The *218-219 MHz Flex NPRM* also suspended, for the pendency of this rulemaking, the late payment fee and automatic cancellation provisions of Section 1.2110(f)(4) of our Rules for licensees that were current in installment payments as of March 16, 1998; stayed decisions on grace period requests properly filed under the Part 1 rules previously in effect; and proposed payment restructuring options.[34] In the *218-219 MHz Order*, we substantially adopted our proposals.

11. Additionally, in the *218-219 MHz Order*, we eliminated the minority- and women- owned business credits previously provided in Auction No. 2. At that same time, to harmonize our treatment of licensees in this service with the treatment of licensees in other services, we granted a bidding credit ("Remedial Bidding Credit") to all winning bidders that met the small business qualifications for Auction No. 2.[35]

12. In the *218-219 MHz Order*, we determined that it would serve the public interest to provide a variety of relief

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applications for the 218-219 MHz service); *see also* Celtronix Telemetry, Inc., Application for Private Land Mobile Radio Services licenses in the 218-219 MHz Band and Request for Waiver of Sections 90.127(b) and 90.155(a) of the Commission's Rules, *Order*, DA. 00-4000 (2000).

[33] *218-219 MHz Flex NPRM*, 13 FCC Rcd. 19064.

[34] *218-219 MHz Flex Order, MO&O, and NPRM*, 13 FCC Rcd. at 19066 & 19073.

[35] *218-219 MHz Order*, 15 FCC Rcd. at 1532-1534 ¶¶ 59-63.

mechanisms to assist current 218-219 MHz Service licensees that were experiencing difficulties in meeting their financial obligations under the installment payment plan. We stated our belief that the mechanisms adopted afforded relief to current licensees while at the same time preserving the integrity of the auction process.[36] We also recognized that for licensees whose licenses had cancelled, enforcement of the payment obligations would be unduly harsh in light of the totality of the circumstances.[37] Thus, we recommended that those entities whose licenses had cancelled should receive debt forgiveness for their outstanding principal balance and accrued interest owed.[38] We continue to believe that the approach adopted in the *218-219 MHz Order* best serves the public interest. Thus, we affirm the *218-219 MHz Order*, as modified by the *218-219 MHz Reconsideration Order*. Below we discuss the particular issues raised by the petitioners, clarify certain points in the *218-219 MHz Order*, and make technical modifications to the rules.

## IV. DISCUSSION

13. The petitioners have made a number of requests that fall into four general categories. The first category includes requests to change the options available under the restructuring plan. The second category includes requests to expand the definition of entities eligible to participate in the restructuring program. The third category consists of miscellaneous requests relating to the restructuring plan. The fourth category consists

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[36] *218-219 MHz Order*, 15 FCC Rcd. at 1520-1521 ¶¶ 37-38.

[37] *218-219 MHz Order*, 15 FCC Rcd. at 1520-1521 ¶ 38.

[38] *Id.*; *See* note 6.

of requests to expand the remedial bidding credit to all current and former licensees.

## A. Options Available in the Restructuring Plan

### i. Disaggregation

14. Background. As noted above, the restructuring plan offers Eligible Licensees three options: (i) Reamortization and Resumption of Payments; (ii) Amnesty; or (iii) Prepayment (Prepayment-Retain or Prepayment-Return).[39] Disaggregation[40] was not proposed or adopted as a restructuring option.

15. Originally, disaggregation was not allowed in this service. However, in the *218-219 MHz Flex Order*, we proposed allowing spectrum aggregation, disaggregation, and partitioning as part of our overall effort to maximize the efficient and effective use of the 218-219 MHz frequency band.[41] In doing so, we recognized that we have already adopted, and proposed adopting, disaggregation, and partitioning for a number of services.[42] The proposal in *218-*

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[39] *See generally 218-219 MHz Order*, 15 FCC Rcd. at 1518-1529 ¶¶ 33-54.

[40] Disaggregation is the assignment of discrete portions or blocks of spectrum licenses to a qualifying entity. Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-474, WT Docket No. 96-148, 11 FCC Rcd. 21831, 21833, n. 2 (1996) ("*Partitioning Report and Order*")

[41] *218-219 MHz Flex Order*, 13 FCC Rcd. at 19066 ¶¶ 2, 50, 53.

[42] *218-219 MHz Flex Order*, 13 FCC Rcd. at 19092 ¶¶ 51, 52; *see also 218-219 MHz Order*, 15 FCC Rcd. at 1546-1547 ¶¶ 92-94; *Partitioning Report and Order*, 11 FCC Rcd. 21831; Amendment of Part 90 of the

*219 MHz Flex Order* to allow spectrum aggregation – in which a licensee could hold both 500 kHz block licenses in a 218-219 MHz Service market – received widespread support.[43] Few commenters addressed disaggregation specifically. Those commenters that supported disaggregation did so based upon the general principle that regulatory parity with other wireless services would benefit licensees. However, one commenter believed that disaggregation would be impractical for such a small amount of spectrum,[44] and another suggested that smaller amounts of spectrum would lower entry barriers for small businesses, but did not discuss what applications, if any, could be supported in the disaggregated spectrum.[45]

16. In adopting partitioning and disaggregation in the

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Commission's Rules to Provide for the Use of the 220-222 MHz Band by Private Land Mobile Radio Service, *Fourth Report and Order*, FCC 97-225, PR Docket No. 89-552, 12 FCC Rcd. 13453 (1997); Rule Making to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rues and Policies for Local Multipoint Distribution Service and Fixed Satellite Services, *Fourth Report and Order*, FCC 98-77, CC Docket No. 92-297, 13 FCC Rcd. 11655 (1998).

[43] *See, e.g.*, comments of ITV, Inc. and IVDS Affiliates, LLC at 13 ("The short answer here is that the current restriction could well have been part of the problem with the development of [the 218-219 MHz] service."); *see also* comments of Commercial Reality St. Pete, Inc. at 5; Dispatch Interactive Television Company at 5; and reply comments of Kingdon Hughes at 8.

[44] 218-219 MHz Licensees comments at 14-15 ("[T]he 218-219 MHz Licensees support the Commission's proposal to allow partitioning on the same terms as other wireless licensees, but believes that disaggregation is impractical for such a small amount of spectrum.")

[45] *See, e.g.*, comments of Gary Petty.

218-219 MHz Service, we concluded that the benefits identified in the *Partitioning Report and Order*, which we had extended to other wireless services, would likewise benefit the 218-219 MHz Service. In doing so, we noted that partitioning the geographic area of a license might provide sufficient flexibility to allow entry into the market by entities that lack sufficient resources to participate in the original auction.[46]

17. Discussion. Under Celtronix's proposal, an Eligible Licensee would elect to retain a portion of the spectrum for a given market and return the remainder to the Commission.[47] This procedure, Celtronix suggests, would encourage parties to use spectrum more efficiently and speed service to unserved and underserved areas. Celtronix says it could provide service on 250 kHz - one half the bandwidth it is currently licensed to use,[48] and notes that 220 MHz SMR frequencies are licensed in blocks smaller than 500 kHz.

18. Although Celtronix's filings at an earlier stage of the proceeding supported a change in the rules to allow disaggregation, it first proposed disaggregation as a restructuring option in its petition for reconsideration.[49] No other commenters or petitioners requested disaggregation as a

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[46] We did not make the same conclusion with respect to disaggregation. *218-219 MHz Order*, 15 FCC Rcd. at 1546-1547 ¶ 94.

[47] Petition of Celtronix at 3.

[48] Petition of Celtronix at 2.

[49] *Compare* Comments of Community Teleplay, Inc. (Celtronix' previous name) and Reply Comments of Community Teleplay *with* Petition of Celtronix.

restructuring option and, as noted above, several actually claimed that the existing 500 kHz blocks are insufficiently small for licensees to develop innovative services that will allow them to compete in the marketplace or to provide optimal interference protection.[50]

19. We believe that we have provided ample flexibility in the restructuring options offered. We recognize these options may not suit every licensee's particular business plan. We decline to modify the restructuring options without a substantial record demonstrating a broad-based need or desire for such a change. Based on the minimal record – as well as the outright skepticism of some commenters that channel blocks smaller than 500 kHz are practical for innovative uses – we are doubtful that service will be developed in the portion of a channel block that would remain after a licensee elects disaggregation as a restructuring option. However, if, in the private marketplace, a licensee (such as Celtronix) and a third party can identify 218-219 MHz Service applications for which disaggregated spectrum is practical, our rules allow and we would encourage such a transaction because it would promote the rapid development of an entire 500 kHz channel block.

20. Finally, we distinguish the 218-219 MHz spectrum from the 220 MHz SMR frequencies identified by Celtronix. Although Celtronix is correct in pointing out that 220 MHz SMR frequencies are licensed in blocks smaller than 500 kHz, 218-219 MHz Service licensees, unlike 220 MHz Service licensees, have TV Channel 13 protection requirements. Because disaggregated spectrum would provide a licensee with more limited interference protection options, we are even less confident that the marketplace would support the auction of

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[50] Comments of IVDS/RLV, L.L.C. and Friends of IVDS, L.L.C. at 2.

disaggregated spectrum blocks in the 218-219 MHz Service. Accordingly, we decline to adopt Celtronix's proposal.

### ii. Refunds of Down Payments

21. Background. The *218-219 MHz Order* allows for refunds of payments in three instances. First, Eligible Licensees that elect Amnesty will receive a refund of installment payments. Second, Ineligible Entities will receive a refund of installment payments. Third, Eligible Licensees that elect Prepayment, depending upon the number of licenses they return, might be entitled to a refund of excess installment payments. In the *218-219 MHz Order*, we specifically declined to provide for the refunds of down payments.[51] Two petitioners, Celtronix and Houston, request that we refund down payments.[52] Specifically, Celtronix requests that we refund the down payments of those Eligible Licensees electing Amnesty. Houston alternatively suggests that we provide a credit equal to the down payments that may be used in future auctions. In essence, both petitioners are requesting that the Commission completely unwind the transaction and provide a full refund.

22. Discussion. We decline to adopt the proposal to refund down payments as part of the restructuring plan as it would place the Eligible Licensees electing Amnesty in virtually the same position they would have occupied had the auction never taken place. In support of its proposal, Celtronix argues that it is inconsistent to allow Eligible Licensees that

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[51] Except to the extent the remedial bidding credit is viewed as a refund.

[52] Petition of Celtronix at 4; Petition of Houston at 3.

elect Prepayment-Return to get an 85 percent credit on the down payments for the returned license, when Eligible Licensees that elect Amnesty are not provided with a full refund on the down payments.[53] Houston supports its proposal by alleging that investors in the service "were victimized by slick promoters."[54]

23. Providing a refund of down payments to those electing the Amnesty option, without an adequate counterbalancing public interest benefit, would undermine the integrity of the auction process by relieving participants of even the most basic obligation of their participation.[55] Such an approach would not only be unfair to the other participants in the original auction, but it would encourage speculation in future auctions. In the *218-219 MHz Order*, we considered and

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[53] Petition of Celtronix at 4.

[54] Petition of Houston at 3.

[55] *218-219 MHz Order*, 15 FCC Rcd. at 1527 ¶ 49; *see also* Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 16436, 16462-63, ¶ 55 (1997) ("*C Block Second Report and Order*"); and Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd. 8345, 8359-8360 ¶ 36-37 (1998) ("*C Block First Reconsideration Order*") (collectively, the "*C Block Restructuring Orders*") (discussing the rational against refunding down payments in the context of the C Block restructuring plan).

rejected a request to return a portion of the down payment.[56] Our decision to allow licensees that elect Prepayment-Return to get an 85 percent credit on the down payment is justified by the public interest benefit of speeding service to the public. Presumably, only a licensees that reasonably believes it has access to adequate sources of capital and a viable business plan will elect Prepayment-Return. Presumably, these licenses will provide service to the public earlier then licenses from a subsequent auction. Thus, this option speeds service to the public. However, no such public interest benefit would accrue from providing a full refund to Eligible Licensees electing Amnesty. While we are sympathetic to Houston's allegations regarding "slick promoters," we note that the Commission's present restructuring plan offers significant relief and that the Commission is not responsible for the actions of third parties. Accordingly, as the public interest is not served by giving licensees a complete refund, we reject petitioners' request.

## B. Entities Eligible to Participate in the Restructuring Plan.

### i. Definition of Eligible Licensees

24. Background. As noted above, the *218-219 MHz Order* adopted, among other things, a restructuring plan for existing licensees that participated in the installment payment plan and that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former

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[56] *218-219 MHz Order*, 15 FCC Rcd. at 1527 ¶49.

installment payment rules ("Eligible Licensees").[57] Other relief has been extended to Ineligible Entities.[58]

25. Discussion. One petitioner, Vista, requests that we modify the definition of Eligible Licensees. In support of its request, Vista argues that it is inequitable to allow licensees that had made no installment payments, but had filed a timely grace period request to retain their license, while refusing to permit licensees that made "substantial payments" to retain their licenses.[59] Vista also argues that the payment instructions provided by the Commission were conflicting, thus justifying a licensee's failure to make payments on its license or justifying a licensees failure to timely file a grace period request.[60] Thus, Vista requests that the standard be modified so that the definition of Eligible Licensees also includes those licensees that have made "substantial payments" as of September 7, 1999, the date that the *218-219 MHz Order* was adopted.[61] In the alternative, Vista requests that former licensees be able to make a retroactive payment sufficient to be deemed "current as of March 16, 1998."[62] As explained below, we reject these arguments and conclude that the approach we have adopted in the *218-219 MHz Order* is equitable and is

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[57] *See 218-219 MHz Order,* 15 FCC Rcd. at 1520 ¶ 37.

[58] *218-219 MHz Order*, 15 FCC Rcd. at 1520-1521 ¶ 38.

[59] Petition of Vista at 3.

[60] Petition of Vista at 2-4.

[61] Petition of Vista at 5.

[62] Petition of Vista at 6.

consistent with the treatment afforded licensees in other services. Accordingly, we decline to change the definition of Eligible Licensees.

26. In the *218-219 MHz Order*, the Commission attempted to balance the need to maintain the integrity of the auction system, with the desire to assist licensees that might be experiencing financial difficulties. In doing so, we recognized the unique factual history of the 218-219 MHz Service.[63] At the same time, we looked to the treatment afforded licensees in other services. Our decision to allow licensees that were current in installment payments (*i.e.* less than 90 days delinquent) as of March 16, 1998 to retain their licenses recognized that these licensees complied with our rules and attempted to fulfill their obligations to the Commission. Similarly, our decision to allow licensees that had timely filed grace period requests to retain their licenses stems from the licensees' ability to recognize their obligation to the Commission and take appropriate steps under our rules to request relief from their obligations in a timely manner. Allowing licensees that had timely filed grace period requests to retain their licenses is also consistent with the treatment afforded licensees in other services under the *Part 1 Third Report and Order*.[64]

27. The test proposed by Vista is inherently subjective

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[63] *218-219 MHz Order*, 15 FCC Rcd. at 1505-1506, 1520 ¶¶ 13, 14, 38.

[64] At the time the *Part 1 Third Report and Order* was adopted, there were grace period requests currently pending before the Commission. In order to avoid disruption in the services, the Commission determined that licensees would not be "deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests." *Part 1 Third Report and Order*, 13 FCC. Rcd. at 441-442 ¶ 113.

and would be unfair to licensees in other services. Administering such a subjective test would be difficult and would invite challenge on the basis of being arbitrary. Further, allowing licensees that failed to abide by the Commission's rules, but had made "substantial payments" to retain their licenses is inconsistent with the Commission's requirement that a licensee make full and timely payments. From such a rule current licensees, in this or other services, might conclude that no consequences would flow from failure to make full and timely payment. Accordingly, we decline to adopt the "substantial payments" test advocated by Vista.

28. Additionally, we also reject Vista's argument that myriad factors created substantial confusion and uncertainty about licensees' payment obligations.[65] Although the date for the initial payment was postponed for a period of time, even the most favorable reading of the Commission's orders and letters to licensees would not lead a licensee to believe that it was excused from its obligation to make payments, or that it did not need to file a grace period request if it determined that it could not make timely payments. To the extent there was any confusion as to the precise date a particular payment was due, the Commission took that into account by defining Eligible Licensees as existing licensees that had participated in the installment payment program and "were current in installment payments as of March 16, 1998." Thus, Vista has failed to provide a reasonable explanation of a licensees' failure to either make payments or file a timely grace period request.

29. Finally, we decline to adopt Vista's request that licensees be able to make retroactive payments sufficient to be

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[65] Petition of Vista at 4-5.

deemed "current as of March 16, 1998." Vista's suggestion would undermine the Commission's rules that timely and full payment are a condition of retaining the license. In light of the ample notice provided licensees regarding the payment rules,[66] and the generous provisions for Ineligible Entities provided in the *218-219 MHz Order*, Vista's suggestion at this late date that it be allowed to make retroactive payments is unsupportable. Thus, we reject Vista's proposal to allow former licensees to make retroactive payments.

### ii. Paid in Full Licensees are not Eligible to Participate in the Restructuring Plan.

30. Background. The restructuring options in the *218-219 MHz Order* are limited to those entities that met the small business qualifications of the auction, availed themselves of the installment payment plan, and have not paid in full.[67] Two petitioners, Hughes and Hot Topics, have requested that all licensees be allowed to turn in a license and receive a refund.[68]

31. Discussion. We decline to adopt the petitioners' request as no public policy interest would be served by allowing all licensees to return their licenses and receive a refund. In support of its proposal, Hughes argues that the Commission has insufficient evidence before it to conclude that installment payment licensees were experiencing financial

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[66] 47 C.F.R. § 1.2110(e)(4)(ii)(1994); *IVDS Grace Period PN*, 10 FCC Rcd. 10724; *see also 1995 IVDS Omnibus Order*, 11 FCC Rcd. at 1285 ¶ 19.

[67] *218-219 MHz Order*, 15 FCC Rcd. at 1520, 1521 ¶¶ 37, 39.

[68] Petition of Hughes at 1-2; Petition of Hot Topics at 1.

difficulties, and that alternatively, some licensees may have simply chosen to walk away from their financial responsibilities.[69] Thus, Hughes concludes that the Commission's action is arbitrary.[70] In the *218-219 MHz Order*, we have previously rejected Hughes arguments.[71] Hot Topics contends that as the technology for the service never developed, a refund to all licensees is appropriate.[72]

32. For licensees utilizing installment payments, we offered a combination of debt restructuring for those entities that wish to retain their licenses and debt forgiveness to a limited number of current and former licensees. The relief is similar to that offered in the *C Block Restructuring Orders*, where the Commission chose to offer limited relief to licensees participating in the installment payment program, but not to those that paid in full.[73] The restructuring plan fulfills the public policy goal of ensuring that the entity best qualified to provide service holds the license, and allows the market to determine the highest use for the license. However, where a licensee has paid in full for the license, nothing would prohibit the licensee from selling the license on the open market. Neither Hughes nor Hot Topics has established that a public policy goal would be fulfilled by unwinding the auction. By contrast, we risk considerable harm in adopting the proposal as

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[69] Petition of Hughes at 2.

[70] Petition of Hughes at 2.

[71] *218-219 MHz Order*, 15 FCC Rcd. at 1521 ¶ 39.

[72] Petition of Hot Topics at 1.

[73] *See C Block Second Report and Order*, 12 FCC Rcd. 16436, at 16450 (1997); *C Block First Reconsideration Order*, 13 FCC Rcd. at 8358-60.

it might create the false expectation in bidders in future auctions in this, or other services, that the Commission would compensate a licensee for any perceived loss in the value of its license. The Commission does not ensure the success of a service or the value of a license in the secondary market. Although, in a secondary market transaction, the licensee might receive less than the amount paid for the license, no public policy concerns would be raised by such a loss. As mandated by Section 309(j) of the Communications Act, the Commission established a competitive bidding process that ensures that licenses are awarded to those that value them most highly as indicated by submitting the highest bid.[74] To grant petitioners' request would encourage bidders to engage in insincere bidding with the expectation that the Commission would ensure against market difficulties encountered after license award.

33. Finally, contrary to Hughes's suggestion, the Commission has considered evidence of the unique financial difficulties experienced by the 218-219 MHz Service licensees participating in the installment payment plan. For example, to our knowledge at least two licensees have filed for bankruptcy.[75] Additionally, in the comments filed by the licensees in response to the *218-219 MHz Flex Order*, and in the various grace period requests received by the Commission, licensees alleged that they have encountered financial difficulties particularly in raising capital. Accordingly, for the reasons discussed above, we decline to allow licenses that have

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[74] 47 U.S.C. § 309(j).

[75] These licenses are IVDS Interactive Acquisition Partners, Case No. SV 95-19539 AG (Bankr. C.D.Cal.), and P.A.W. Inc., Case No. 96-1011 (Bankr. N.D. Ohio); *see also* Comments of MKS at para 7, page 3.

paid in full to participate in the restructuring plan.

### C. Miscellaneous Requests Relating to the Restructuring Plan

#### i. Grace Periods.

34. In the *Part 1 Third Report and Order*, we modified the installment payment grace period and late payment fee provisions of our Rules as applied to all licensees participating in an installment payment plan at that time.[76] One petitioner, Celtronix, proposes to exempt 218-219 MHz Service licensees from the modified installment payment grace period and late payment fee provisions of the new Part 1 rules. Celtronix's petition in this proceeding offers the same argument that it previously offered in its petition for reconsideration of the *Part 1 Third Report and Order*. Specifically, Celtronix argues that applying these rules to 218-219 MHz Service licensees constitutes impermissible retroactive rulemaking.[77] We rejected this argument in the *Order on Reconsideration of the Part 1 Third Report and Order*[78] and concluded that our new Part 1 rules do not violate the prohibitions on retroactivity under the Administrative Procedure Act ("APA").[79] We see no reason to revist this issue in this proceeding.

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[76] *Part 1 Third Report and Order*, 13 FCC Rcd. at 434-42 ¶¶ 103-113.

[77] Petition of Celtronix at 5.

[78] *Order on Reconsideration of the Part 1 Third Report and Order*, ¶¶ 18, 20-22.

[79] 5 U.S.C. § 701 *et. seq.*

### ii. Notes and Security Agreements.

35. Background. In the *218-219 MHz NPRM* we indicated that "[e]very licensee electing to continue making installment payments would be required to execute appropriate loan documents, that may include a note and security agreement, as a condition of reamortization of its installment payment plan under the revised ten-year term, pursuant to Section 1.2110(f)(3) of the Commission's rules."[80] In the *218-219 MHz Order,* we indicated that Eligible Licensees electing resumption "may be required to execute loan documents."[81] The *Implementation Procedures PN,* in turn, indicated that those Eligible Licensees electing Reamortization/Resumption would be "required to execute loan documents in the form of an Installment Payment Acknowledgement."[82] In general, the acknowledgement contains a restatement of the amount of the debt owed, the payment terms under the *218-219 MHz Order*, and references other Commission rules and regulations related to the payment of installment debt. The *Implementation Procedures PN* also notes that "licensees may also be required to execute a Uniform Commercial Code financing statement (UCC-1)."[83] The *Implementation Procedures PN* further informs Eligible Licensees that failure to fully and timely execute and deliver the requisite loan document(s) as of ten business days from receipt will result in the automatic

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[80] *218-219 MHz Order,* 15 FCC Rcd. at 1521 ¶ 39.

[81] *218-219 MHz Order*, 15 FCC Rcd. at 1524-1525 ¶ 44.

[82] *Implementation Procedures PN*, 15 FCC Rcd. 7329 (2000).

[83] *Id.*

cancellation of the license.[84]

36. Discussion. One petitioner, In-Sync, argues that requiring loan documents, specifically notes and security agreements, is unnecessary and would constitute a retroactive rulemaking.[85] We reject this argument. As discussed in the *Implementation Procedures PN*, the Bureau has determined not to require notes and security agreements, but will require the execution of other loan documents that evidence that the licensee understands and agrees to the restructured financing terms. Those licensees that do not wish to execute the required documents may elect Amnesty or elect Prepayment.[86]

37. The APA's definition of "rule" provides that a rule "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedures, or practice requirements of an agency . . ."[87] By definition, a rule has legal consequences only

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[84] *Id.*

[85] Petition of In-Sync at 4-5.

[86] Under the terms of the original loans, the licensee was obligated to have paid off the balance of the loan by five years from the grant date. Thus, licensees granted licenses on January 18, 1995 should have paid off the loan by January 18, 2000, licensees granted licenses on February 28, 1995 should have paid off the loan by February 28, 2000, and licensees granted licenses on May 17, 1995 should have paid off the loan by May 17, 2000. If an Eligible Licensee strongly disagrees with executing new loan documents, it is always at liberty to pay off its original obligation in full immediately.

[87] 5 U.S.C. § 551(4).

for the future.[88] Thus, absent explicit statutory authority to the contrary, the APA precludes an agency from issuing rules that alter the past legal consequences of past actions. The requirement that Eligible Licensees execute loan documents does not violate this proscription. We have not gone back to past transactions and imposed penalties for conduct that was previously allowed. Rather, we are establishing prospective procedures to allow licensees to continue to meet their previously established payment obligation to the Commission. The mere fact that these rules deal with past transactions does not constitute unlawful retroactive rulemaking under the APA.[89] Further, the Bureau's decision to require the execution of loan documents by Eligible Licensees that elect Reamortization and Resumption of Payments is based upon the reasonable concern that the Government's interests are adequately protected in the event of default. Accordingly, we

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[88] *Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 388 (D.C. Cir. 1972); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216 (1988)(concurrence).

[89] *See e.g., Bowen*, 488 U.S. at 219-220, where Justice Scalia gave the following illustration of a regulation that was not impermissibly retroactive under the APA:

> The Treasury Department might prescribe, for example, that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered nontaxable will be taxable – whether those trusts were established before or after the effective date of the regulation. That is not retroactivity in the sense at issue here, *i.e.*, in the sense of altering the past legal consequences of past actions. Rather, it is what has been characterized as "secondary" . . . A rule with exclusively future effect . . . . can unquestionably affect past transactions (rendering previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA.

agree with the approach adopted by the Bureau and reject petitioner's request.

**iii. Interest Calculation.**

38. Background. In the *218-219 MHz Flex Order*, the Commission suspended the automatic cancellation rules.[90] The effect of this was not to suspend the obligation of licensees to make payments; rather it merely suspended the consequences of failing to make payment. As the underlying debt remained, a licensee was still permitted to make payments. In fact, some licensees have continued to make payments during the suspension period. However, licensees that failed to make payments did not face automatic cancellation.

39. Discussion. Two petitioners, In-Sync and Celtronix, argue that interest should not have continued to accrue during the suspension period.[91] In-Sync argues that as the *218-219 MHz Flex Order* suspended the obligation to make the payments as of March 1998, interest should have not have continued to accrue during the period since March 1998.[92] Additionally, both In-Sync and Celtronix argue that the *218-219 MHz Order* is unclear and, accordingly, interest should not be calculated for the suspension period.[93] Specifically, Celtronix points to the fact that in the *218-219 MHz Order* the

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[90] *218-219 MHz Flex Order*, 13 FCC Rcd. at 19098-19099 ¶ 68. This suspension period took effect on March 16, 1998 and will continue until after the Election Date.

[91] Petition of In-Sync at 7; Petition of Celtronix at 5.

[92] Petition of In-Sync at 7.

[93] Petition of Celtronix at 5; Petition of In-Sync at 6-7.

Commission stated that it will capitalize all "accrued and unpaid" interest into the principal amount as of the election date.[94] However, in section 95.816(c)[95] of our Rules, we stated that "all unpaid interest" from the grant date through the election date will be capitalized into the principal. From this, Celtronix concludes that we did not intend interest to accrue. Both petitioners are mistaken. As the underlying debt remained, the interest continued to accrue. The fact that the Commission relieved the licensees of one consequence of failing to make timely payments does not mean that the Commission intended to also relieve the licensees of all the consequences of failing to make payments. Further, given the sums involved, for at least some licensees, it would require approval by the Department of Justice to forgive the interest incurred during the suspension period.[96] We note that the licensees had the use of the licenses during this period of time. As the petitioners have failed to provide any basis to forgive the interest, the Commission is not inclined to request debt forgiveness on this issue. Accordingly, petitioners' request is rejected.

**D. Remedial Bidding Credit**

40. Background. Pursuant to statutory mandate,[97] our

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[94] Petition of Celtronix at 6, In-Sync at 6-7.

[95] 47 C.F.R. § 95.816(c).

[96] *See* 31 U.S.C. §§ 3711, 3720B.

[97] 47U.S.C. § 309(j); 1993 Budget Act, Congress enjoined the Commission to ensure that businesses owned by minorities and women are given the opportunities to participate in the provision of spectrum based services and in this regard, directed us to consider the use of among other things bidding

auction rules have included provisions to encourage participation by minority- and women-owned entities, small businesses, and rural telephone companies.[98] Thus, when the auction for what is now the 218-219 MHz Service was conducted on July 28 and 29, 1994, (Auction No. 2), Part 95 of the Commission's rules included provisions that allowed small businesses to pay eighty percent of their winning bids in installments.[99] Businesses owned by minority- and or women-owned entities were also entitled to a twenty-five percent bidding credit that could be applied to one of the two licenses available in each market.[100] Bidders that were both small businesses and minority- and or women-owned entities received bidding credits and were allowed to participate in the installment plan.[101]

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credits. *See* 47 U.S.C. § 309(j)(4)(D). Specifically, the statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."

[98] *See* 47 C.F.R. §§ 1.2110, 95.816(d)(3); *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd. 2330 at ¶¶ 34-35 (IVDS).

[99] 47 C.F.R. § 95.816(d)(3) (1994)(incorporating by reference 47 C.F.R. § 1.2110(1994)).

[100] 47 C.F.R. § 95.816(d)(1); *see also Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2391-2392 ¶¶ 242-243 (describing the general designated entity bidding credit); *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd. at 2336 ¶ 36 (218-219 MHz rules).

[101] In fact, all minority- and women-owned entities that received a bidding credit also participated in the installment payment plan.

41. At the time our rules were adopted for Auction No. 2, the standard of review applied to federal programs designed to enhance opportunities for racial minorities and women was an "intermediate scrutiny standard."[102] In June 1995, almost a year after the conclusion of Auction No. 2, the U.S. Supreme Court decided *Adarand Constructors v. Pena*, holding that racial classifications are subject to "strict scrutiny" and will be found unconstitutional unless "narrowly tailored" and in furtherance of "compelling governmental interests."[103] The following term, the Court decided in *United States v. Virginia*, that to successfully defend a gender based program, the government must demonstrate an "exceedingly persuasive justification" for the program.[104] As explained in the *218-219 MHz Order*, after Auction No. 2, Graceba and others raised constitutional questions concerning the bidding credits used in the 218-219 MHz service.[105] In addition, the Commission, in

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[102] *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 564-65 (1990)( ". . . benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.").

[103] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

[104] *United States v. Commonwealth of Virginia (VMI)*, 518 U.S. 515 (1996).

[105] *218-219 MHz Order*, 15 FCC Rcd. at 1503 ¶ 9. Graceba Total Communications, Inc. (Graceba) – a winning bidder on two markets – filed two petitions challenging the 218-219 MHz Service auction methodology as artificially inflating prices and questioned the constitutionality of the bidding credits that were awarded in the auction. Graceba did not qualify for a bidding credit. Graceba requested a twenty-five percent reduction in its total bid amount. In December 1995, the Commission denied Graceba's petitions; *see* Interactive Video and Data Service (IVDS) Licenses, *Order*,

the *Competitive Bidding Sixth Report and Order*, and the *Competitive Bidding Sixth Memorandum Opinion and Order*, questioned whether the record was sufficiently developed to support the race and gender-based provisions of the C block competitive bidding rules and the competitive bidding rules of other services under a strict scrutiny standard.[106] In order to avoid delay of two scheduled auctions, the Commission decided to eliminate the race and gender based provisions for

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11 FCC Rcd. 1282 (1995). Upon appeal by Graceba, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) remanded the constitutional issue to the Commission for further consideration. *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997). In the course of Graceba's litigation, two other parties – Community Teleplay, Inc. (Community) and the IVDS Coalition (Coalition) – intervened in support of Graceba's constitutional arguments. Graceba subsequently filed a petition for review of the *218-219 MHz Order* with the D.C. Circuit. Before the appellate court, Graceba principally sought a 25 percent bidding credit over and above the 25 percent bidding credit afforded in the *218-219 MHz Order*. In addition, Graceba sought attorneys' fees under a variety of theories including the Equal Access to Justice Act, 28 U. S.C. § 2412, 5 U.S.C. § 504, the fee shifting provisions of 42 U.S.C. § 1982, and the common fund doctrine. In a memorandum opinion denying the petition for review, the appellate court rejected all of Graceba's arguments, including its request for an additional bidding credit and its request for attorneys' fees. *Graceba Total Communications, Inc. v. FCC*, No. 99-1437 (D.C. Cir. Dec. 5, 2000).

[106] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 143 (1995); *Erratum*, 11 FCC Rcd. 5433 (1995) ("*Competitive Bidding Sixth Report and Order*"); *Competitive Bidding Sixth M.O. &O.*, 11 FCC Rcd. at 19367 ¶ 62 (tentatively concluding that the record was insufficient to withstand strict scrutiny); *see also* Implementation Of Section 309(j) Of The Communications Act -Competitive Bidding, *Tenth Report and Order*, PP Docket No. 93-253, FCC 96-447, 11 FCC Rcd. 19,974 ¶ 18 (1996) (changes IVDS rules for the second auction in the service).

those auctions and instead employ a similar provision for small businesses.[107] However, in light of the Commission's statutory mandate, the Commission commenced a series of studies to examine the minority and female ownership of telecommunications and electronic media facilities in the Unites States.[108] Despite these efforts, in establishing rules for auctions in other services, we have continued to note that the record remains insufficient to support any racial or gender based provision under the standard established by the Supreme Court in *Adarand* and *VMI*.[109]

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[107] *Competitive Bidding Sixth M.O. &O.*, 11 FCC Rcd. at 19369 ¶ 67 (rules for the then planned second IVDS auction); *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd. 136, 161, 167 ¶¶ 1, 47, 59 (C Block rules).

[108] Studies currently underway by the Commission's Office of Communications Business Opportunities ("OCBO") include demographic reviews of the sale and transfer of wireless facilities and broadcast stations.

[109] *See e.g.*, Service Rules For The 746-764 And 776-794 MHz Bands, And Revisions To Part 27 Of The Commission's Rules, *First Report and Order*, WT Docket No. 99-168, 15 FCC Rcd. 476, 531 ¶ 136 (2000); Service Rules For The 746-764 And 776-794 MHz Bands, And Revisions To Part 27 Of The Commission's Rules, *Second Report And Order*, WT Docket No. 99-168, 2000 WL 263689, 15 FCC Rcd. 5299, 5345 ¶ 110 (2000); Amendment Of The Commission's Rules Regarding Multiple Address Systems, *Report And Order*, WT Docket No. 97-81, FCC 99-415, 2000 WL 35680 ¶ 126 (2000); Amendment Of Part 90 Of The Commission's Rules To Facilitate Future Development Of SMR Systems In The 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation Of Sections 3(n) And 332 Of The Communications Act – Regulatory Treatment Of Mobile Services, GN Docket No. 93-252, Implementation Of Section 309(j) Of The Communications Act – Competitive Bidding, *Memorandum Opinion And Order On Reconsideration*, PP Docket No. 93-253, FCC 99-270, 14 FCC Rcd. 17556, 17597 ¶ 86 (1999); Amendment Of Part 90 Of The Commission's Rules To Facilitate Future Development Of SMR Systems In The 800 MHz Frequency Band, PR Docket No. 93-144 RM-8117, RM-8030, RM-8029, Implementation Of Sections 3(N) And 322

42. In the *218-219 MHz Order*, consistent with the modifications made to the rules governing the auction of licenses in other services, we eliminated the minority- and women-owned business bidding credit previously afforded licensees in the first 218-219 MHz auction. Thus, all minority- and women-owned businesses lost the bidding credit they had previously received in the original auction in the 218-219 MHz Service conducted in 1994. At the same time, recognizing that we have provided bidding credits in other services to small businesses, we determined to grant a twenty-five percent bidding credit to the accounts of every winning bidder in the 1994 auction "that met the small business qualifications for that auction."[110]

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Of The Communications Act – Regulatory Treatment Of Mobile Services, GN Docket No. 93-252, Implementation Of Section 309(J) Of The Communications Act – Competitive Bidding, *Second Report And Order*, PP Docket No. 93-253, FCC 97-223, 12 FCC Rcd. 19079, 19167 ¶ 271 (1997); Implementation Of Section 309(j) Of The Communications Act -- Competitive Bidding For Commercial Broadcast And Instructional Television Fixed Service Licenses, MM Docket No. 97-234, Reexamination Of The Policy Statement On Comparative Broadcast Hearings, GC Docket No. 92-52, Proposals To Reform The Commission's Comparative Hearing Process To Expedite The Resolution Of Cases, *First Report And Order*, GN Docket No. 90-264, FCC 98-194, 13 FCC Rcd. 15920, 15994 ¶ 189 (1998); Amendment Of The Commission's Rules Regarding The 37.0-38.6 GHz And 38.6-40.0 GHz Bands, ET Docket No. 95-183, RM-8553, Implementation Of Section 309(j) Of The Communications Act – Competitive Bidding, 37.0-38.6 GHz And 38.6-40.0 GHz, *Report And Order And Second Notice Of Proposed Rule Making*, PP Docket No. 93-253, FCC 97-391, 12 FCC Rcd. 18600, 18661 ¶ 148 (1997).

[110] *218-219 MHz Order*, 15 FCC Rcd. 1533-1534 ¶ 61.

43. Discussion. A few petitioners have requested that the 25 percent credit granted to small business be applied to the accounts of all winning bidders regardless of whether they met the small business qualifications for the auction.[111] One petitioner, Ad Hoc Coalition, argues that the provision of the remedial bidding credit, although facially neutral, was impermissibly motivated by a desire to assist women and minority businesses and is thus constitutionally flawed under *Hunt v. Cromartie*.[112] Another petitioner, Hughes, argues that the Commission's response to the constitutional issue is inequitable as "all bidders in the auction suffered from the inflated prices of the licenses caused by the bidding credits."[113] Hughes concludes that "all winning bidders, whether they paid in full or not should be afforded a remedy."[114] For the reasons discussed below, we reject these arguments and decline to expand the remedial bidding credit to all winning bidders in Auction No. 2.

44. The arguments of Hughes and Ad Hoc Coalition are based upon the assumption that we accorded bidding credits to all small business as a direct remedy for race and gender discrimination. That is incorrect. In order to address the questions raised concerning the constitutionality of race- and gender-based bidding credits, we eliminated those credits. This was the extent of the "remedy" provided for Graceba's

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[111] Petition of Kingdom Hughes at 3-4; Petition of Ad Hoc Coalition a 5-9.

[112] Petition of Ad Hoc Coalition (*citing Hunt v. Cromartie*, 119 S. Ct. 1545 (1999)(facially neutral policy may violate constitution if it is impermissibly motivated)).

[113] Petition of Hughes at 4.

[114] Petition of Hughes at 4.

concerns. However, as this issue was not raised until after the auction closed, we determined that it would be disruptive and unfair not to provide some form of bidding credit in this service, as licensees had crafted business plans in reliance upon the credit. Therefore, consistent with our practice in subsequent auctions, we choose to afford all small businesses an after the fact bidding credit. Thus, in effect, we leveled the bidding credit benefit upward. In doing so, we minimized the potential for disruption to entities that had previously qualified for the credit, we equalized the regulatory treatment between the 218-219 MHz Service and the many other services in which we have extended bidding credits to all small businesses, and we fulfilled our statutory mandate of encouraging participation of entrepreneurs, rural telephone companies, and businesses owned by members of minority groups and women.[115] The credit accorded small businesses thus solved a multi-faceted and complex set of regulatory issues. Those issues are not presented with respect to larger businesses such as Hughes and those represented by the Coalition, for Congress has not directed us to take special steps to ensure the participation of large companies. We, therefore, have no obligation to extend to such companies the same approach we have adopted toward smaller businesses.

45. The remedial bidding credit affords 218-219 MHz Service licensees treatment similar to that afforded licensees in other services.[116] Because the credit is not based on racial or gender classifications, it is not subject to a strict scrutiny analysis. Instead, our policy operates in a neutral manner and does not subject anyone to unequal treatment on the basis of

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[115] 47 U.S.C. § 309(j).

[116] *See* note 110 above.

race or gender.[117] It therefore should be evaluated on the more deferential rational basis review.

46. Under rational basis review, government action is permissible unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes the government's actions are deemed irrational. In areas of social and economic policy, a classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.[118]

47. As we have stated previously with respect to small business credits, the remedial bidding credit for small businesses furthers Congress's objective of disseminating licenses among a wide variety of applicants.[119] That reasonable

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[117] A facially neutral law warrants strict scrutiny only if it can be proved that the law was "motivated by a racial purpose or object," *Miller v. Johnson*, 515 U.S. 900, 913 (1995), or if it is "'unexplainable on grounds other than race'," *Shaw v. Reno*, 509 U.S. 630, 644 (1993)(citations omitted). In order to prove that a facially neutral rule, such as the one involved here, violates equal protection guarantees, a challenger must demonstrate a racially discriminatory purpose behind the rule. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

[118] *See Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 600-603, (1987); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-179 (1980); *Dandridge v. Williams*, 397 U.S. 471, 484-485 (1970).

[119] Service Rules For The 746-764 And 776-794 MHz Bands, And Revisions To Part 27 Of The Commission's Rules, *First Report and Order, Eighth Report an Order, and Second Further Notice of Proposed*

objective is the basis for our decision to grant small business credits whether prospectively or retroactively as in this instance.[120] Thus, the Commission's decision to grant remedial bidding credits to small businesses is entirely permissible. The fact that the pool of licensees eligible for the credit includes all the licensees that had previously been afforded the minority- and women-owned bidding credit is immaterial to the lawfulness of our approach. Indeed, that correspondence is not surprising because women and minority businesses are frequently, although not exclusively, small businesses. Accordingly, we reject Ad Hoc Coalition's argument that the bidding credits were impermissibly motivated.

48. With respect to Hughes comments that the existence of bidding credits inflated the prices paid by licensees, such a contention is wholly speculative. Hughes has failed to provide any evidence indicative of inflation in the bidding due to the existence of bidding credits, nor has it provided an analysis that would distinguish such inflation in the bidding price due to bidding credits from other factors. Further, as explained above, the elimination of the race- and gender-based bidding credits was the "remedy" provided for any alleged constitutional concerns. Even had Hughes provided an evidentiary basis, we would decline to offer the relief requested. Thus, as Hughes' comment is purely speculative, we dismiss it as such.

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*Rulemaking*, WT Docket No. 99-168, 11 FCC Rcd. 1463, at 1524¶ 110 (1995).

[120] *See Omnipoint Corp. v. FCC*, 78 F. 3d 620 (D.C. Cir. 1996)(upholding the Commission's determination to eliminate race and gender based provisions of the C block competitive bidding rules and instead employ similar provisions for small businesses).

## D. Technical Modifications to the Rules

49. On our own motion, we make several technical modifications to conform our rules to the *218-219 MHz Order*. Among these changes, we correct the cross-reference to Section 95.815(a) contained in Section 95.861 of our Rules to specify the interference plan discussed in the text of the *218-219 MHz Order*, clarify that CTSs provide fixed service, and specify that the general Part 1 transfer and assignment procedures apply to all 218-219 MHz Service licensees, regardless of how they obtained their license. Although Section 1.902 of the Rules makes these transfer and assignment procedures broadly applicable to all the Wireless Radio Services, we conclude that the inclusion of a specific cross-reference to Section 1.948 of the Rules in Part 95 will aid 218-219 MHz Service licensees in meeting their obligations under our general Part 1 rules. We also remove the individual licensing requirements for CTSs that may have an environmental effect or require obstruction marking and lighting, because we already collect this information elsewhere in our rules.

## V. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the petitions for reconsideration filed in response to the *218-219 MHz Order* are DENIED.

51. IT IS FURTHER ORDERED, that pursuant to that authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the technical modifications to the Commission's rules, as described herein and in Appendix B,

ARE HEREBY ADOPTED. These modifications shall become effective 60 days after publication of this *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order* in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

## APPENDIX A

### List of Petitioners

1. In-Sync Interactive Corporation and Loli Inc., Bay Interactive Ventures, Inc., ABR Communications, Inc., Faycomm, Inc., IVDS On-Line Partnership, Cyberforce, LLC., Southeast Equities, Inc.
2. Vista Communications, Inc.
3. Ad Hoc Coalition. The Ad Hoc Coalition consists of the following entities: Celtronix Telemetry, Inc.; TV-Active, L.L.C.; Texas Interactive Network, Inc.; Hispanic & Associates; Zarg Corporation; IVDS Interactive Acquisition Partners; United Interactive Partners, Inc.; and G. Ray Hale.
4. Celtronix Telemetry, Inc.
5. Letter from Philip M. Brown regarding Tise Partners.
6. Kingdon R. Hughes.
7. Hot Topics Network.
8. Houston Spectrum Associates, L.L.C.

## APPENDIX B

**Part 2 – Frequency Allocations and Radio Treaty Matters; General Rules and Regulations**

1. Footnote US317 in Section 2.106, the Table of Frequency Allocations, is revised to read as follows:

**§ 2.106 Table of Frequency Allocations**

* * * * *

US 317 The band 218.0-219.0 MHz is allocated on a primary basis to 218-219 MHz Service operations.

* * * * *

**Part 95 -- Personal Radio Services**

2. Section 95.803 is revised to read as follows:

**§ 95.803 218-219 MHz Service description.**

(a) The 218-219 MHz Service is authorized for system licensees to provide communication service to subscribers in a specific service area.

(b) The components of each 218-219 MHz Service system are its administrative apparatus, its response transmitter units (RTUs), and one or more cell transmitter stations (CTSs). RTUs may be used in any location within the service area. CTSs provide service from a fixed point, and certain CTSs must be individually licensed as part of a 218-219 MHz Service system. *See* § 95.811 of this part.

(c) Each 218-219 MHz Service system service area is

one of the cellular system service areas as defined by the Commission, unless modified pursuant to § 95.823 of this part.

3. Section 95.807 is amended by revising paragraphs (a), (a)(1), and (a)(4) to read as follows:

**§ 95.807 Requesting regulatory status.**

(a) Authorizations for systems in the 218-219 MHz Service will be granted to provide services on a common carrier basis or a private (non-common carrier and/or private internal-use) basis.

(1) Initial applications. An applicant will specify on FCC Form 601 if it is requesting authorizations to provide services on a common carrier, non-common carrier or private internal-use basis, of a combination thereof.

* * * * *

(4) Pre-existing licenses. Licenses granted before [effective date of rules] are authorized to provide services on a private (non-common carrier) basis. Licensees may modify this initial status pursuant to Paragraph (a)(3) of this Section.

* * * * *

4. Section 95.811 is amended by revising paragraph (b) and adding paragraph (e) to read as follows:

**§ 95.811 License requirements.**

* * * * *

(b) Each CTS where the antenna does not exceed 6.1 meters (20 feet) above ground or an existing structure (other than an antenna structure) and is outside the vicinity of certain receiving locations (see § 1.924 of this chapter) is authorized under the 218-219 MHz System license. All other CTS must be individually licensed.

* * * * *

(e) Each CTS (regardless of whether it is individually licensed) and each RTU must be in compliance with the Commission's environmental rules (see part 1, subpart I of this chapter) and the Commission's rules pertaining to the construction, marking and lighting of antenna structures (see part 17 of this chapter).

5. Section 95.812 is amended by revising paragraph (a) to read as follows:

**§ 95.812 License term.**

(a) The term of each 218-219 MHz service system license is ten years from the date of original grant or renewal.

* * * * *

6. Section 95.816 is amended by revising the last sentence in paragraph (b) and revising paragraphs (c)(3) and (c)(5) to read as follows:

**§ 95.816 Competitive bidding procedures.**

* * * * *

(b) * * * The interest rate will equal the rate for five-year U.S. Treasury obligations at the grant date.

(c) * * *

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraph (c)(1) or (c)(2) of this section, the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

* * * * *

(5) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (c)(1) of this section (or each of which individually satisfies the definition in paragraph (c)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

* * * * *

7. Section 95.819 is revised to read as follows:

**§ 95.819 License transferability.**

(a) A 218-219 MHz Service system license, together with all of its component CTS licenses, may be transferred, assigned, sold, or given away only in accordance with the provisions and procedures set forth in § 1.948 of this chapter.

For licenses acquired through competitive bidding procedures (including licenses obtained in cases of no mutual exclusivity), designated entities must comply with §§ 1.2110 and 1.2111 of this chapter (see § 1.948(a)(3) of this chapter).

(b) If the transfer, assignment, sale, or gift of a license is approved, the new licensee is held to the construction requirements set forth in § 95.833 of this part.

8. Section 95.861 is amended by revising paragraph (c) to read as follows:

**§ 95.861 Interference.**

* * * * *

(c) A 218-219 MHz Service licensee must provide a copy of the plan required by § 95.815 (a) of this part to every TV Channel 13 station whose Grade B predicted contour overlaps the licensed service area for the 218-219 MHz Service system. The 218-219 MHz Service licensee must send the plan to the TV Channel 13 licensee(s) within 10 days from the date the 218-219 MHz Service submits the plan to the Commission, and the 218-219 MHz Service licensee must send updates to this plan to the TV Channel 13 licensee(s) within 10 days from the date that such updates are filed with the Commission pursuant to § 95.815 of this part.

* * * * *

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term 2000

No. 99-1437

Graceba Total Communications, Inc.,
Petitioner

v.

Federal Communications Commission
and United States of America,
Respondents.

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On Petition for Review of an Order of the
Federal Communications Commission

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FILED FEB 12 2001

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BEFORE: Williams. Rogers and Tatel, Circuit Judges

***ORDER***

Upon consideration of petitioner's petition for rehearing filed January 19, 2001, it is

**ORDERED** that the petition be denied.

***Per Curiam***

**FOR THE COURT:**
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

# PERTINENT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

## Constitutional Provisions

**U.S. Const. Amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Statutory and Regulatory Provisions[1]

**5 U.S.C. § 553. Rule making.**

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual

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[1] All citations to statutes and regulations are to the current version unless noted otherwise.

notice thereof in accordance with law. The notice shall include--(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply--(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

**5 U.S.C. § 702 Right of Review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

**28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

**28 U.S.C. § 2343. Venue**

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

**28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service**

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--(1) the nature of the proceedings as to which review is sought; (2) the facts on which venue is based; (3) the grounds on which relief sought; and (4) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

**47 U.S.C. § 309(j)(3)(B) Design of Systems of Competitive Bidding**

(3) Design of Systems of Competitive Bidding.-- *** the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 1 of this Act and the following objectives:
***

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women; ***

**47 U.S.C. § 309(j)(4)(A),(C),(D) Contents of Regulations**

(4) Contents of Regulations--In prescribing regulations pursuant to paragraph (3), the Commission shall--

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods; ***

(C) consistent with the public interest, convenience, and necessity, the purposes of this Act, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures ***

**47 U.S.C. § 402. Judicial review of Commission's orders and decisions**

(a) Procedure. Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28. ***

(j) Finality of decision; review by Supreme Court. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

**47 C.F.R. § 1.2110 Designated Entities**

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(c) Definitions. ***

(3) Businesses owned by member of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. *** The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian, and Asian American extraction.

**47 C.F.R. § 24.129 (1996) Frequencies**

The following frequencies are available for narrowband PCS. All licenses on channels indicated with an (*) will be eligible for bidding credits of 25 percent, and all licenses indicated with an (**) will be eligible for bidding credits of 40 percent, as set forth in Sec. 24.309(b) if competitive bidding is used to award such licenses. (a) Eleven frequencies are available for assignment on a nationwide basis as follows:

(1) Five 50 kHz channels paired with 50 kHz channels:

Channel 1: 940.00-940.05 and 901.00-901.05 MHz;
Channel 2: 940.05-940.10 and 901.05-901.10 MHz;
Channel 3: 940.10-940.15 and 901.10-901.15 MHz;
Channel 4: 940.15-940.20 and 901.15-901.20 MHz; and,
Channel 5: 940.20-940.25 and 901.20-901.25 MHz:*

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 6: 930.40-930.45 and 901.7500-901.7625 MHz;
Channel 7: 930.45-930.50 and 901.7625-901.7750 MHz; and,
Channel 8: 930.50-930.55 and 901.7750-901.7875 MHz;*

(3) Three 50 kHz unpaired channels:

Channel 9: 940.75-940.80 MHz;
Channel 10: 940.80-940.85 MHz; and,
Channel 11: 940.85-940.90 MHz.*

(b) Six frequencies are available for assignment on a regional basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:
Channel 12: 940.25-940.30 and 901.25-901.30 MHz; and,

Channel 13: 940.30-940.35 and 901.30-901.35 MHz.**

(2) Four 50 kHz channels paired with 12.5 kHz channels:

Channel 14: 930.55-930.60 and 901.7875-901.8000 MHz;
Channel 15: 930.60-930.65 and 901.8000-901.8125 MHz;
Channel 16: 930.65-930.70 and 901.8125-901.8250 MHz; and,
Channel 17: 930.70-930.75 and 901.8250-901.8375 MHz.**

(c) Seven frequencies are available for assignment on a MTA basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:
Channel 18: 940.35-940.40 and 901.35-901.40 MHz; and,
Channel 19: 940.40-940.45 and 901.40-901.45 MHz.*

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 20: 930.75-930.80 and 901.8375-901.8500 MHz;
Channel 21: 930.80-930.85 and 901.8500-901.8625 MHz; and,
Channel 22: 930.85-930.90 and 901.8625-901.8750 MHz.*

(3) Two 50 kHz unpaired channels:

Channel 23: 940.90-940.95 MHz; and,
Channel 24: 940.95-941.00 MHz.*

(d) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a BTA basis:

Channel 25: 930.90-930.95 and 901.8750-901.8875 MHz; and,
Channel 26: 930.95-931.00 and 901.8875-901.9000 MHz.*

Note 1: Operations in markets or portions of markets which border other countries, such as Canada and Mexico, will be

subject to on-going coordination arrangements with neighboring countries.

**47 C.F.R. § 24.309 (1996) Designated entities**

(a) Designated entities entitled to preferences in the narrowband PCS service are small businesses and businesses owned by members of minority groups and/or women as defined in Secs. 24.320(b) and 24.320(c).

(b) Designated entities will be eligible for certain special narrowband PCS provisions as follows: (1) Installment payments. (i) Small businesses, including small businesses owned by members of minority groups and women, will be eligible to pay the full amount of their winning bids on any regional, MTA or BTA license in installments over the term of the license pursuant to the terms set forth Sec. 1.2110(e) of this chapter. (ii) Businesses owned by members of minority groups and women that are winning bidders for the regional licenses indicated by an (**) in Sec. 24.129 may pay the full amount of their winning bids (less the applicable bidding credit and down payment) in installments with (A) Interest imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; (B) Interest-only payments for the first two years; and (C) Principal and interest payments amortized over the remaining eight years of the license. (2) Bidding Credits. Businesses owned by member of minority groups and women, including small businesses owned by members of minority groups and women, will be eligible for a twenty-five (25) percent bidding credit when bidding on the following licenses: (i) The nationwide licenses on Channel 5, Channel 8 and Channel 11; (ii) All MTA licenses on Channel 19, Channel 22, Channel 24; and (iii) All BTA licenses on Channel 26. This bidding credit will reduce by 25 percent the bid price that businesses owned by members of minority groups

and women will be required to pay to obtain a license. Businesses owned by women and/or minorities, including small businesses owned by women and/or minorities will be eligible for a forty (40) percent bidding credit when bidding on all regional licenses on Channel 13 and Channel 17. In Sec. 24.129, the licenses that will be eligible for 25 percent bidding credits are indicated by an (*); the licenses that will be eligible for 40 percent bidding credits are indicated by an (**). (3) Tax Certificates. Any non-controlling initial investor in a business owned by members of minority groups and/or women and who provides "start-up" financing, which allows such business to acquire a narrowband PCS license(s), and any non-controlling investor who purchases an interest in a narrowband PCS license held by a business owned by members of minority groups and/or women with the first year after license issuance, may, upon the sale of such investment or interest, request from the Commission a tax certificate. Any narrowband PCS licensee who assigns or transfers control of its license to a business owned by members of minority groups and/or women may request that the Commission issue the licensee a tax certificate.

(c) Short-Form Application Certification; Long-Form Application Disclosure. (1) All applicants for licenses under the designated entity provisions set forth in this section shall certify on their short-form applications (Form 175) that they are eligible for those preferences pursuant to this section. (2) In addition to the requirements in subpart I, all designated entity applicants that are winning bidders shall, in an exhibit to their long-form applications--(i) Identify each member of the applicant's control group, regardless of the size of the member's total interest in the applicant, and each member's minority group or gender classification, if applicable; (ii) Disclose the gross revenues of the applicant and its affiliates, and other persons that hold interests in the applicant and their affiliates (including all members of the applicant's control

group); and (iii) Certify that the personal net worth of the applicant (if an individual), each affiliate and each person that hold an interest in the applicant is less than $40 million.
(d) Audits. Applicants and licensees claiming eligibility under this section shall be subject to random audits by the Commission.

(e) Definitions. The terms affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, gross revenues, members of minority groups, passive equity, personal net worth, and small business used in this section are defined in Sec. 24.320.

(f) Unjust Enrichment. Designated entities using installment payments, bidding credits or tax certificates to obtain a narrowband PCS license will be subject to the following unjust enrichment provisions: (1) If a small business paying for a narrowband PCS license in installment payments seeks to transfer a license to a non-small business entity during the term of the license, the remaining principal balance must be repaid as a condition of the license transfer. (2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensees shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of the change as a condition of approval. Increases in gross revenues that result from equity investments that are not attributable to the licensee under Sec. 24.320(b)(2)(iv), revenues from operations, business development or expanded service shall not be considered changes in ownership structure under this paragraph.

**47 C.F.R. § 24.321 Designated entities. *****

(c) Bidding credits. *** (2)(i) Businesses owned by members of minority groups and women, including small businesses owned by members of minority groups and women, that are winning bidders on nationwide licenses on Channel 5, Channel 8, and Channel 11 prior to August 7, 2000 will be eligible for a twenty-five (25) percent bidding credit. (ii) Businesses owned by members of minority groups and women, including small businesses owned by members of minority groups and women, that are winning bidders on regional licenses on Channel 13 and Channel 17 prior to August 7, 2000 will be eligible for a forty (40) percent bidding credit.

(d) Installment payments. Small businesses, including small businesses owned by members of minority groups and women, that are winning bidders on any regional license prior to August 7, 2000 will be eligible to pay the full amount of their winning bids in installments over the term of the license pursuant to the terms set forth in §1.2110(f) of this chapter.

**47 C.F.R. § 24.711 Upfront payments, down payments and installment payments for licenses for frequency Block C.**

*** (b) Installment payments. Each eligible licensee of frequency Block C or F may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to §1.2110(g) of this chapter and under the following terms: *** (4) For an eligible licensee that qualifies as a business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first three years and payments of interest and principal amortized over the remaining seven years of the license term.

(5) For an eligible licensee that qualifies as a small business owned by members of minority groups and/or women or as a consortium of small business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

**47 C.F.R. § 24.720 Definitions.** ***

(c) Business Owned by Members of Minority Groups and/or Women. A business owned by members of minority groups and/or women is an entity:

(1) In which the qualifying investor members of an applicant's control group are members of minority groups and/or women who are United States citizens; ***

(d) Small Business Owned by Members of Minority Groups and/or Women: Consortium of Small Businesses Owned by Members of Minority and/or Women. A Small business owned by members of minority groups and/or women is an entity that meets the definitions in both paragraphs (b) and (c) of this section. A consortium of small businesses owned by members of minority groups and/or women is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definitions in paragraphs (b) and (c) of this section. ***

(i) Members of Minority Groups. Members of minority groups include individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian, and Asian American extraction. ***

(n) Qualifying Investor; Qualifying Minority and/or Woman Investor.

(1) A qualifying investor is a person who is (or holds an interest in) a member of the applicant's (or licensee's) control group and whose gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the gross revenues and total assets limits specified in §24.709(a), or, in the case of an applicant (or licensee) that is a small business, do not exceed the gross revenues limit specified in paragraph (b) of this section.

(2) A qualifying minority and/or woman investor is a person who is a qualifying investor under paragraph (n)(1), who is (or holds an interest in) a member of the applicant's (or licensee's) control group and who is a member of a minority group or a woman and a United States citizen.

(3) For purposes of assessing compliance with the minimum equity requirements of §24.709(b)(5) and (6), where such equity interests are not held directly in the applicant, interests held by qualifying investors or qualifying minority and/or woman investors shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain. ***

**47 C.F.R. § 95.816 (1996) Competitive bidding proceedings.**

(a) Mutually exclusive IVDS initial applications are subject to competitive bidding.

(b) The General Procedures set forth in 47 CFR part 1, subpart Q are applicable to competitive bidding proceedings used to select among mutually exclusive applicants for initial IVDS licenses.

(c) The specific procedures applicable to auctioning particular IVDS licenses will be set forth by Public Notice. Generally, the following competitive bidding procedures will be used to auction mutually exclusive IVDS licenses. The Commission, however, may design and test alternative procedures. (1) Competitive bidding design options and mechanisms. The Wireless Telecommunications Bureau will select competitive bidding design(s) and mechanisms in accordance with Secs. 1.2103 and 1.2104 of this chapter. If simultaneous multiple round bidding is used, the Wireless Telecommunications Bureau has the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted at any time before or during the course of the auction. (2) Forms. (i) Applicants must submit short-form applications (FCC Form 175) as specified in Commission Public Notices. Minor deficiencies may be corrected prior to the auction. Major modifications such as changes in ownership, failure to sign an application or failure to submit required certifications will result in the dismissal of the application. See 1.2105(a) and (b) of this chapter. (ii) Applicants must submit a long-form application (FCC Form 600) within ten (10) business days after being notified that it is the winning bidder for a license. See 1.2107(c) and (d) of this chapter. (3) Upfront payments. For oral outcry bidding, applicants will be required to show the Commission or its representative, immediately prior to the auction, a cashiers check for at least $2500 in order to get a bidding number and secure a place in the room where the bidding will take place. Bidders will be required to have $2500 upfront money for every five licenses they win. No upfront payment will be required from applicants in single-round sealed bid auctions. See 47 CFR 1.2106. (4) Down payments. See Sec. 1.2107(b) of this chapter. (5) Full payment. Auction winners, except for small businesses eligible for installment payments, must pay the balance of their winning bids in a lump

sum within five (5) business days following the grant of their license(s). The grant of a license(s) to an auction winner(s) will be conditioned on the timely payment of all monies due the Commission. See 47 CFR 1.2109(a). (6) Withdrawal, default or disqualification. See Secs. 1.2104(g) and 1.2109 of this chapter.

(d) Designated entities. Designated entities are small businesses, and businesses owned by members of minority groups and/or women, as defined in 47 CFR 1.2110(b). (1) Bidding credits. A winning bidder that qualifies as a business owned by women and/or minorities may use a bidding credit of twenty five (25) percent to lower the cost of its winning bid. (2) Installment payments. Each licensee that qualifies as a small business may pay the remaining 80 percent of the net auction price in quarterly installment payments pursuant to Sec. 1.2110(e) of this chapter. Licensees who qualify for installment payments are entitled to pay their winning bid amount in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for five-year U.S. Treasury obligations. Payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining three years of the license term. A license issued to an eligible small business that elects installment payments shall be conditioned on the full and timely performance of the license holder's quarterly payments. (3) Audits. (i) Applicants and licensees claiming eligibility under this section shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors. (ii) Consent to such audits is part of the certification included in the short-form application (Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents, and other material (including accounting procedures and practices) regardless of form or type, sufficient

to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed IVDS and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) Unjust enrichment. Any business owned by minorities and/or women that obtains a IVDS license through the benefit of tax certificates shall not assign or transfer control of its license within one year of its license grant date. If the assignee or transferee is a business owned by minorities and/or women, this paragraph shall not apply; Provided, however, that the assignee or transferee shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

**47 C.F.R. § 95.816(f) (originally § 95.816(g))**

Winning bidders in Auction No. 1, which took place on July 28-29, 1994, that, at the time of that auction, met the qualifications under the Commission's rules then in effect, for small business status will receive a twenty-five percent bidding credit pursuant to Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Report and Order and Memorandum Opinion and Order, FCC 99-239 (released September 10, 1999).

**Portions of Transcript of Appeals Court**
**Oral Argument Held Tuesday November 14, 2000**
**In No. 99-1437 (D.C. Cir.)**

[page 11, ln. 16] THE COURT: Well, I understand how you [ln. 17] could argue that the provision of discounts had a [ln. 18] tendency to raise the ultimate price, so that if the [ln. 19] remedy had been no discount, I can see a disadvantage [ln. 20] to you. In other words, if the FCC had equalized that way, ln. 21] but since it equalized by giving you a discount, [ln. 22] I'm not sure I see a problem.

[page 27, ln. 2] MR. MARCUS: That is clearly a standing [ln. 3] issue. As far as Judge Williams' question on this [ln. 4] case, I think it's a standing issue, mostly in the [ln. 5] sense of Article 3, case or controversy. They ask for [ln. 6] a certain type of relief, we gave them that relief.

[page 32, ln. 17] MR. MARCUS: I think that we, in effect, [ln. 18] conceded that we couldn't defend the constitutionality [ln. 19] of this preference program. We said the record [ln. 20] doesn't support it and we're not going to try to mount [ln. 21] a defense of this thing.

[ln. 22] And once you get that far, I think the [ln. 23] Commission felt uncomfortable, perhaps, in saying we [ln. 24] discriminated against people on the grounds of race, [ln. 25] but by saying we're not going to defend the program, [page 33, ln. 1] it amounted to a situation where the Commission [ln. 2] reached the point where it said to itself now we have [ln. 3] to come up with what to do in these circumstances and [ln. 4] it chose the 25 percent discount has [sic] the remedy that [ln. 5] it was going to give to equalize the parties which is, [ln. 6] of course, exactly the remedy that they requested all [ln. 7] along.